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In The

SUPREME COURT of the UNITED STATES

October Term, 1973

No. 73-1268

EUGENE H. SKAAR and
ELLEN SKAAR, his wife,

Petitioners,

v.

WISCONSIN DEPARTMENT
OF REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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INDEX

PAGE

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS INVOLVED 3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 4-5

STATEMENT OF THE CASE 6-9

REASONS FOR GRANTING THE WRIT 10-14

I. By Adding The Wife's Separate Income To The Income Of The Husband, The Court Below Has Decided An Important Constitutional Question Contrary To The Decisions Of This Court 10

II. The Registered Title Of Property Does Not Necessarily Determine The True Ownership Of The Property 11-12

III. Petitioners Agreed They Owned And Held All Farm Property As Equals 13-14

EXAMPLES OF WISCONSIN SUPREME COURT'S DENIAL OF DUE PROCESS AND EQUAL PROTECTION 15-20

DECISION OF COURT BELOW CREATES CONFUSION 21-23

THERE IS NO RATIONAL REASON TO REQUIRE THE EXISTENCE OF A BONA FIDE PARTNERSHIP 23-26

PAGE

IRREBUTTABLE PRESUMPTION EXISTS 26-29

RIGHT TO SPLIT FARM INCOME SHOULD BE EXTENDED TO THE PETITIONERS 30-31

REASONS PETITIONERS DID NOT FILE FEDERAL PARTNERSHIP RETURNS 31-32

SUMMATION OF ARGUMENT 32-34

CONCLUSION 34

CITATIONS

CASES:

Commissioner of Internal Revenue v. Tower, 66 S. Ct. 532, 327 U. S. 280 (1946) 12

Estate of Everett Otte v. Commissioner, T. C. Memo 1972-76, March 28, 1972 ..... 12, 14, 17, 18

Evans v. Commissioner, 447 F. 2d 547 (1971) 11, 24

Harkness v. United States, 469 F. 2d 310 (1972) 33

Heiner v. Connan, 285 U. S. 312 (1932) 28

Hoeper v. Tax Commissioner, 248 U. S. 206, 52 S. Ct. 120 (1931) 10, 23, 33

Lewis v. White, 56 F. 2d 390, (D. Mass. 1932), Appeal dismissed 61 F. 2d 1046 (1st Cir. 1932) 3

PAGE

Moritz v. Commissioner of Internal Rvenue, 468 F. 2d 466, 10th Circuit (1972) 30

Schmidt v. Lessard, 349 F. Supp. 1078 (1973), Case No. 73-568, Vacating judgment of District Court dated July 14, 1974 22

Sparks v. Kuss, 195 Wis. 378, 216 N. W. 929 11

Welsh v. United States, 398 U. S. 333 (1970) 31

CONSTITUTIONAL PROVISIONS:

Due Process Clause, U. S. Const., Amend. XIV, Sec. 1 ..... 3, 4

Equal Protection Clause, U. S. Const., Amend. XIV, Sec. 1 ..... 3, 4

WISCONSIN STATUTES:

Sec. 246.01 ..... 4, 18, 32

246.03 ..... 4, 18, 32

246.05 24

246.15 ..... 5, 10, 33

700.17 (2) 4, 5, 10, 32

TEXTS CITED:

PAGE

33 Am. Jur. 2d, Sec. 1504, (Partnerships) 21

46 Am. Jur. 2nd, (Joint Ventures) 12

48 Am. Jur. 2nd, Sec. 2, (Labor and Labor Relations) 11

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WISCONSIN DEPARTMENT
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The petitioners, Eugene H. Skaar and Ellen Skaar, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Supreme Court entered in this proceedings on November 12, 1973.

OPINIONS

The opinion of the Supreme Court of Wisconsin (App. 1)[1] is officially reported at 61 Wis. 2d 93 and is unofficially reported at 211 N. W. 2d 642.

The Memorandum Decision of the Wisconsin Circuit Court (App. 14) is not reported.

The decision and order of the Wisconsin Tax Appeals Commission (App. 28) is not reported.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on November 12, 1973. A timely motion for rehearing was denied on December 21, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C., Section 1257 (3).

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[1]References to "App. ....." are to the separate Appendix to this petition.

QUESTIONS INVOLVED

I. Were petitioners denied their rights to due process and equal protection of the law under Section 1, Fourteenth Amendment, United States Constitution, when the Court required that the husband add the wife's separate income to his income and pay additional state income tax thereon?

II. Were petitioners denied their right to due process and equal protection of the law under Section 1, Fourteenth Amendment, United States Constitution, when the Court denied them the right to split the capital gain income from their jointly owned property without proving to be a bona fide partnership, when the Wisconsin Department of Revenue allows other husband and wife taxpayers to split capital gains income from jointly owned property without proving to be a bona fide partnership or filing a partnership tax return?

III. Was the petitioner, Ellen Skaar, denied her rights to due process and equal protection of the law under Section 1, Fourteenth Amendment, United States Constitution, when the Court denied her the right to claim and own, for all tax purposes, the one-half of the joint income derived from jointly owned property that she equally managed and controlled with her husband, and did as much work (or more) than he did in the farm operation in producing said income?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are the Due Process and Equal Protection Clauses of the United States Constitution; Chapter 246, Wisconsin Statutes; Sec. 246.01, Wisconsin Statutes; Sec. 246.03, Wisconsin Statutes; and Sec. 700.17 (2), Wisconsin Statutes.

DUE PROCESS AND EQUAL PROTECTION CLAUSE, U. S. CONSTITUTION, AMENDMENT XIV, SECTION 1.

> . . . nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER 246 PROPERTY RIGHTS OF MARRIED WOMEN (1971)[2]

Section 246.01 *Realty of.* (1971)[2] The real estate of every description, including all held in joint tenancy with her husband, and the rents, issues and profits thereof of any female now married shall not be subject to the disposal of her husband, but shall be her whole and separate property as if she were unmarried.

Section 246.03 *May receive, Hold and Convey Property* (1971).[2] Any married female may receive by inheritance or by gift, grant, devise or bequest from any person, hold to her sole and separate use, convey and devise real and personal property and any interest or estate therein of any description, including all held in joint tenancy with her husband, and the rents, issues and profits thereof in the same manner and with like effect as if she were unmarried, and

the same shall not be subject to the disposal of her husband nor be liable for his debts.

SECTION 246.15, WIS. STATS. (1971)

246.15 *Women to Have Equal Rights.*[2] Women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, and in all other respects. The various courts, executive and administrative officers shall construe the statutes where the masculine gender is used to include the feminine gender unless such construction will deny to females the special protection and privileges which they now enjoy for the general welfare. The courts, executive and administrative officers shall make all necessary rules and provisions to carry out the intent and purpose of this section.

SECTION 700.17 (2)[2] CHARACTERISTICS OF JOINT TENANCY.

Each of 2 or more joint tenants has an equal interest in the whole property for the duration of the tenancy, irrespective of unequal contributions at its creation. On the death of one of two joint tenants, the survivor becomes the sole heir.

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[2]Wording of Statute is the same since 1929.

STATEMENT OF THE CASE

The petitioners, Eugene H. Skaar and Ellen Skaar, are husband and wife, and since about 1950 have been engaged in the business of farming. Both are now 51 years of age. In 1951, the Wisconsin Department of Revenue (hereinafter "Department") through legislative act adopted the use of a Combined Income Tax Return upon which each must report their separate incomes or split their combined incomes from joint property and separately pay tax thereon. Commencing in 1962 and possibly since 1958, the petitioners reported their farm income, capital gains and rents as the one-half income of each, and continued to do so up to and including the tax year of 1968. (App. 16) All money received by them was deposited in one joint account. Ellen Skaar worked approximately twelve hours per day every day in farm work. Twice a day she participated in the milking and feeding of the herd; took care of the chickens; baled hay, drove the baler and unloaded the hay; prepared the tobacco seed beds, planted the plants, helped with the tobacco harvest and with the stripping; and drove tractors. (App. 16, 17) The wife's hands were rough and calloused from the hard farm work. The sale of milk constituted by far the greatest portion of the gross farm income for each of the three tax years in question and the milk checks received have been payable to both petitioners with an "or" between their names. The farms were owned by the petitioners as joint tenants. They had an understanding that all their property would be the joint property of both on an equal basis, and that they would manage and work the farm operation on an equal basis.

Checks for sale of cattle were made out to the husband and the bills usually came in his name, but the wife pays them, by signing her name to the checks written on their joint account. Claims for gasoline tax refunds have been made in the husband's name only, because the invoices for the gasoline had been made out in his name by the distributor. The husband paid the social security tax on the farm income as he had always done on prior tax returns. The motor vehicles were registered in his name upon the advice of their insurance agent. The purebred cattle were registered in Mr. Skaar's name for convenience.

The Department levied an additional income tax assessment against the husband for the tax years of 1966, 1967 and 1968 by notice dated July 13, 1972. The additional tax was determined by adding the farm income reported as the wife's income to the husband's income and the capital gains reported by her were also added to his income, making a total additionl tax assessment against the husband in the amount of $1,910.09.

On July 31, 1970, the Department denied petitioners' application for abatement. An appeal was heard by the Wisconsin Tax Appeals Commission (hereinafter "Commission") and on March 30, 1970, it affirmed the Department's denial of petitioners' application for abatement. An appeal was made to the Circuit Court of Dane County and Judge George R. Currie[3] reversed the decision of the Commission on November 9, 1972. The Wisconsin Supreme

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[3]Judge Currie is the former Chief Justice of the Supreme Court of Wisconsin, sitting as Reserve Circuit Judge.

Court by a five to two decision dated November 12, 1973, reversed the decision of the Circuit Court.

The principal Findings of Fact as determined by the Commission are as follows:

1. That the petitioners owned both their farms as joint tenants. (App. 30)

2. That the petitioners had an oral understanding as to the conduct of the farming operations; and that understanding was that they would work together, own everything together, make their decisions together, manage the farm together, and they would hold everything together. It was their understanding that if one of them died, the other would have everything to the exclusion of their children. It was their understanding that if either one of them were away from the farm, the other could do anything necessary to be done and transact business until the other returned. (App. 3, 31)

3. That the farm business was conducted by the husband as a sole proprietorship with the loyal assistance and cooperation of his wife. (App. 34)

4. That the wife spent as much time or more than the husband in the conduct of the farming operations. (App. 30)

5. The petitioners deposited all their income in one joint checking account and all expenses were paid from said joint account. (App. 30, 31)

6. The petitioners also were joint owners of rental properties. (App. 31) The rents from same were split for income tax purposes for the same tax years in question.

and, the Department has not questioned the right of the petitioners to legally report and pay income taxes thereon as the one-half property of each.

There is no Wisconsin Statute requiring a husband and wife to be a bona fide partnership in order to split their income from jointly owned property as a business. The stipulation[4] entered into between the parties at the Circuit Court level of the appeal does not require the existence of a bona fide partnership nor does it require the filing of a partnership tax return in order to split husband and wife jointly owned or earned income. The formality of filing a partnership tax return would not have changed the petitioners state tax liability.

A more complete statement of the facts is enumerated in the decisions of the Commission, the Circuit Court and the Court below as shown in the Appellant's Appendix filed herewith.

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[4]IT IS HEREBY STIPULATED . . . that:

2. It has been the practice of said Department to allow a husband and wife each to report for income taxation one-half of the income received as real property rentals, interest, dividends or capital gains from sales of stocks or real property, where the property from which such income is derived is owned jointly by such husband and wife in equal shares, regardless of whether they file partnership income tax returns and regardless of whether such husband and wife contributed equal amounts of capital for the acquisition of such property.

3. It has been the practice of said Department to accept the filing of federal and state partnership income tax returns for a husband and wife partnership in a farming or any other type of business as strong evidence of earnings of both husband and wife, based upon work performed by each.

REASONS FOR GRANTING WRIT

The first and paramount reason for granting a writ of certiorari is that the decision below is discriminatory against women and is arbitrary in light of the Married Women's Act and the Joint Property Act of Wisconsin. There is no rational basis on which the Court below can justify the necessity of its decision in equity or law. The Due Process Amendment does not allow the legislature, under police powers, to lawfully enact the law that was established by the Court below, which in effect allows the Department to add the wife's income to that of the husband.

In *Hoeper v. Tax Commissioner*, 248 U. S. 206, 52 Sup. Ct. 120 (1931) this Court, in reversing 202 Wis. 493, 233 N. W. 100 (1930), held that the statute combining separate earnings from a separate business of the wife with that of the husband for tax purposes, violated the due process laws of the Fourteenth Amendment. The Court relied upon Section 246.15, Wis. Stats., supra, which guarantees women equal rights in Wisconsin "in all respects" and directs the Courts to "make all necessary rules and provisions to carry out the intent and purpose" of said statute. In the instant case the wife, under the Married Women's Act, is as much a separate entity in owning her earnings from a joint business with her husband as she is if she was engaged in separate employment. Therefore, the decision in *Hoeper* is applicable, and since it took the determination of this Court to prevent the unlawful taxation in *Hoeper*, it is again our only alternative here.

Section 700.17 (2), Wis. Stats., provides that "each of two joint tenants has an equal interest in the whole prop-

erty". The capital interest in the farms and the personal property, which was the equal joint property of the petitioners, was a material income-producing factor. *Evans v. Commissioners*, 447 F. 2d 547 (1971), p. 551, states that in a partnership in which capital is a material income-producing factor, " a corporation which owns a capital interest in a business, . . . , is the owner of the income derived from the capital interest, . . ." When the Commission found that the wife did as much or more farm work than the husband, it decided she was not only the owner of one-half the farm income, but also earned the one-half thereof.

In 48 Am. Jur. 2d, (Labor and Labor Relations) at Sec. 2 is stated,

> "Labor is deemed to be property especially within the meaning of the constitutional guarantees. Thus the right to acquire property includes the right to acquire property by labor. The right to earn wages is just as much property and within the meaning of the due process clause of the Fourteenth Amendment to the Federal Constitution."

The Court below placed unwarranted significance upon the fact that the motor vehicles and the purebred cattle were registered in the husband's name, and that the gas tax refunds were in his name also, which was explained to be on advice of others or for convenience. This did not change the true ownership of the property according to the accepted law of Wisconsin, other states and federal tax Courts.

In *Sparks v. Kuss*, 195 Wis. 378, p. 390, 216 N. W. 929, the Court held that, "the mercantile stock and fixtures

which had always been held, insured and assessed for taxation purposes in the name of the husband" alone, was in fact property co-owned by the husband and wife. In the estate tax case, *Estate of Everett Otte v. Commissioner*, T. C. Memo 1972-76, March 28, 1972, the Court ruled:

> "Furthermore, we believe the evidence shows that all the property included in the gross estate was acquired from joint earnings, even though some of it may have been in the decedent's name alone. . . . One-half the value of such items is to be excluded from the decedent's taxable estate."

In further support of this well accepted principle of law, 46 Am. Jur. 2nd, (Joint Ventures), p. 59, states:

> "Even though title is permitted to be taken in the name of one of the co-venturers, the right of the other is not impaired thereby, for under such circumstances the one holding title becomes a trustee for all."

The technicality of being the registered owner of certain items of personal property acquired from joint earnings had very little significance in who actually owned and earned the farm income. The wife had equal constitutional rights therein with her husband.

The requirement of the majority decision of the Court below, that taxpayers had to file a partnership return (which is not required by statute nor by the stipulation) in order to split their farm income had little legal significance as pointed out in the dissenting opinion of the Court below, when it cited *Commissioner of Internal Revenue v. Tower* (1946), 327 U. S. 280, at 291, 66 S. Ct. 532, which states,

". . . transactions between husband and wife calculated to reduce family taxes should always be subjected to special scrutiny. . . . By the simple expedience of drawing up papers, single tax earnings cannot be divided into two tax units and surtaxes cannot be thus avoided."

It was the petitioners' understanding between them that they owned all property equally between them and the record shows the wife contributed as much effort, work and management to the farm business as did her husband, thereby earning an equal amount of income therefrom. A layman's reasonable expectation of the intended consequences of his actions should be the basis of the law. The petitioners intended to have a farm business agreement with equal rights of ownership, management, participation and reward. The law should be governed by what they did or are, not by what they should have done by way of paid legal advice in order to comply with some superfluous technical legal requirement, which is a mystery to them. In this regard, Mrs. Skaar testified,

"I had no formal education in the definition of the word partnership. I guess its legal meaning is a mystery to me. I have an agreement with my husband relative to the business of farming" . . . "I guess I consider as much of the property mine as his."

Mr. Skaar testified that,

"Sure, it's a partnership between us."

And a disinterested neighbor, Mr. Holten, testified,

"To me, it appears that the farm operation is by both of them."

This testimony which was unchallenged and not controversial, clearly shows that all the property of the petitioners was owned equally by them as joint tenants.

The decision of the Court below determined that the wife owned none of the farm income for tax purposes; it also decided that she owned none of the farm property for United States Estate Tax purposes or Wisconsin Inheritance Tax purposes. *Otte*, supra, was a United States Estate Tax case where the taxpayer was a resident of Indiana and the facts are nearly an exact duplicate of this case. The Court there said:

> "Working as a 'husband and wife team,' petitioner (wife) contributed an adequate and full consideration in money or money's worth in the acquisition of her one-half interest in all of the real and personal property enumerated in decedent's (husband) Federal Estate Tax Return and included in the latter's taxable gross estate. . . ."

The Tax Court further found,

> "That only one-half of the value of jointly owned farm land and equipment was includible in the (husband's) gross estate of the decedent," . . . "that the surviving wife had contributed 'full consideration' in money's worth in the acquisition of her one-half interest in the property by virtue of the many and varied farm services she had rendered in the operation and management of the couple's farm."

EXAMPLES OF WISCONSIN SUPREME COURT'S DENIAL OF DUE PROCESS AND EQUAL PROTECTION

1. Suppose husband and wife are a "team" owning and operating a farm together, from which they earn a combined taxable income of $10,000.00 per year. Under the decision of the Court below, the ½ income (therefrom) owned and earned by the wife is combined with the husband's income, and through graduated rates a larger tax is extracted than the tax would have been if they were assessed separately. Therefore, the husband is assessed tax on the entire $10,000.00, and their combined state tax is $574.00 under 1973 Wisconsin Tax rates.

Now, let's say the wife cannot physically do the heavy farm work. So she takes a job in town, and earns a net income of $5,000.00 which she and her husband take and employ a hired man to take her place on the farm. The net farm income is now reduced from $10,000.00 to $5,000.00, all of which is taxable to the husband. Their combined taxable earning is still $10,000.00, but the wife's $5,000.00 earnings from wages is all taxable to her. Therefore, their combined tax liability is much less, even though they earned the same amount of $10,000.00.

Now, their combined state tax is $405.80. ($202.90 each) This is $168.20 less tax for the same family income. If you take the additional tax imposed upon the family over a period of 24 years and invest it at 5% annual interest the total loss to the family would amount to $7,485.24.

Now, let's assume the same husband and wife work as a "team" for 24 years and the husband dies. We'll say

during that time the accumulated combined net taxable estate is $240,000.00. Under the decision of the Court below, since it decided that none of the petitioner's farm income was the income of the wife, the entire $240,000.00 estate would be taxable to the wife, and her United States Estate Tax liability would be $9,350.00. ($240,000.00 less marital deduction of $120,000.00, less standard exemption of $60,000.00, leaving taxable estate of $60,000.00. Tax on $60,000.00 is $9,500.00, less $150.00 local death tax credit, leaves tax of $9,350.00) The wife's Wisconsin Inheritance Tax (under 1974 reduced rates) would be $8,875.00, since the entire $240,000.00 is considered the sole property of the husband for tax purposes.

Had the Court below allowed the husband and wife to split their combined incomes as ½ the income of each, and the husband died. The wife's United States Estate Tax would be zero. (Combined taxable estate of $240,000.00, $120,000.00 excludable as sole property of the wife, less $60,000.00 marital deduction, less $60,000.00 standard exemption, leaves no taxable estate to surviving widow.) Likewise, her Wisconsin Inheritance Tax would be reduced from $8,875.00 to $2,875.00. And now consider that, under the same circumstances, the wife died. The husband's United States Estate Tax on their combined estate would be zero. (Combined taxable estate $240,000.00, $120,000.00 excludable as sole property of husband, less $60,000.00 marital deduction and less $60,000.00 standard exemption, leaves no taxable estate.) His Wisconsin Inheritance Tax would be the same as the wife in the amount of $2,875.00, since both would be treated as equals.

But, now let's say we follow the decision of the Court below and the wife dies. The husband's United States Estate Tax would be zero, because it's all his property and wife has no taxable estate even though she legally owned one-half of it and earned one-half of same. Likewise, his Wisconsin Inheritance Tax would be zero for the same reason while she would have had to pay $8,875.00.

If under the same circumstances the Court would have followed the rule of *Otte*, that they owned the property equally for tax purposes as a "team", then the United States Estate Tax for either survivor on a $240,000.00 combined taxable estate would be zero. The Wisconsin Inheritance Tax would be $2,875.00 to either survivor, without regard to who died first.

Now, let's say we take the case exampled above where the wife worked in town and earned $5,000.00 for 24 years, and each year she and her husband took the $5,000.00 and employed a hired man to take her place on the farm and accumulated a taxable joint estate of $240,000.00, and the husband dies. Using the decision of the Court below, the $5,000.00 per year earned by the wife, for United States Estate Tax and Wisconsin Inheritance Tax is "traceable as contribution by the wife" and her United States Estate Tax is zero. ($5,000.00 times 24 years, equals $120,000.00, subtracted from $240,000.00, leaves a husband's estate of $120,000.00, less $60,000.00 marital deduction and less $60,000.00 standard exemption, leaves no taxable estate.) Her Wisconsin Inheritance Tax would be $2,875.00. If the wife died first, the husband's United States Estate Tax and Wisconsin Inheritance Tax would be the same. But, if the wife did the farm work of the hired man, and did not

have separate employment, her United States Estate would be $9,350.00, compared to his tax of zero, and her Wisconsin Inheritance Tax would be $8,875.00, compared to his of $2,875.00. This is a clear violation of the spirit of the Wisconsin Married Women's Act[5] under the equal protection clause of the Fourteenth Amendment, United States Constitution.

Assuming the Court follows the *Otte* rule in the case where the wife works in town and takes her $5,000.00 per year income for 24 years, to employ a hired man for their co-owned farming operation. Neither the husband or wife would pay any United States Estate Tax, and each would pay $2,875.00 Wisconsin Inheritance Tax.

2. Further, with the same circumstances of a $240,000.00 taxable estate of a "husband and wife team", the husband dies in Wisconsin. Under the decision of the Court below, the entire $240,000.00 would be the husband's property and the surviving wife would pay $9,350.00 Federal Estate Tax. (Same calculation as above). The same "husband and wife team" in Indiana, under the rule of *Otte*, would not pay any United States Estate Tax despite the fact they were, in both instances, United States citizens. A federal tax in Indiana should be the same as Wisconsin under like circumstances. It is different because the Internal Revenue Service taxes on the basis of the income owned and estate contributed as determined by the law of the state. Therefore, this Court must protect Wisconsin residents from the unconstitutional decision of the Court below in order to insure equal protection and avoid the taking of property without due process of law.

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[5]Sections 246.01 and 246.03, Wis. Stats. (1971)

3. The Court below allowed the petitioners to split their rental income from co-owned property purchased from their joint account, without filing a partnership tax return. Why should rents be treated differently from farm land income resulting from a co-owned operation on a co-owned farm? The capital investment in the farm and farm personalty contributed substantially to the farm income, so it should be treated the same for tax purposes as rents, interest, dividends or capital gains from similarly owned joint property.

4. Now, if a husband and wife are joint owners of a farm and they cash rent the farm to a neighbor for $5,000.00 per year. This income is reportable on the Form 1040, Federal Tax Return under Schedule E, Part II, as Rents and Royalty Income. It is split on the Wisconsin combined Income Tax Return between them. Now let's say the next year this same couple had put the same farm in the U. S. Agricultural Program and receive $5,000.00 per year from the program. The farm work performed by the husband and wife is exactly the same for both years. The agricultural program payments are reportable in Schedule F, Form 1040, Part I, under Agricultural Payments, as farm income. Then, under the decisions of the Court below, the $5,000.00 income from the farm on the Wisconsin Combined Income Tax Return is all the income of the husband, resulting in a much higher tax to the taxpayers because of the graduated tax rates.

5. The Court below denied the petitioners the right to split the capital gains from the cattle sold, without filing a partnership tax return, even though the stipulation (supra p. 9) allows same and the Wisconsin Tax Appeals

Commission made a Finding of Fact that the taxpayers had an "understanding" that they would "own" and "hold" everything together. (App. 31) This is clearly unequal protection of the law between taxpayers, which this Court should by its rule of extension of the law "extend" to the petitioners.

6. Suppose a husband in Wisconsin inherits a million dollars. He takes same (after payment or gift taxes) and buys an apartment complex in joint tenancy with his wife, and receives $50,000.00 net rents per year. He does all the management, keeps all the books, repairs the buildings, and rents the apartments. His wife contributes nothing to the business. Under the ruling of the Court below, this husband and wife can equally split the net rental income of $50,000.00 on their Wisconsin Combined Income Tax Return. The petitioners did exactly the same thing with the income from their jointly owned farm that they managed, owned and operated together; yet they were denied the right to split their farm income, without being a bona fide partnership and filing a partnership tax return.

7. Now, let's consider a husband who inherits a million dollars and invests same in stocks in the joint name of he and his wife. He has all the expertise of investment and does all the work and management. His wife never looks at the investments. Under the ruling of the Court below, they can split the income from capital gains on their Wisconsin Combined Income Tax Return without being a bona fide partnership and without filing a partnership tax return. But, the petitioners were denied this right by the Court below on their co-owned cattle.

DECISION OF COURT BELOW CREATES CONFUSION

In order to legally file a Wisconsin Partnership Income Tax Return the petitioners are required to file, and must file a Federal Partnership Income Tax Return. The Wisconsin Income Tax Return is modeled after the federal return. (App. 4) In fact, Wisconsin has adopted the federal income tax filing requirements and federal forms, with a few statutory modifications. Neither the law involved in this case, nor the law of filing partnership returns, is one of those statutory modifications. There is little doubt but that the petitioners qualify as partners under the federal law, enabling them to file a partnership income tax return.[6] They are not required to, but the choice is theirs. The majority opinion of the Court below denies them the right to file a state partnership income tax return, because they decided they were not a bona fide partnership under the Wisconsin Uniform Partnership Act. Therefore, the petitioners are caught in a dilemma. If they choose to file a federal partnership return, they can't file a state partnership return. State law does not allow the filing of a state partnership return without filing a federal partnership return. Petitioners cannot file a federal partnership return even though they are entitled to, because the Court's decision below precludes it. They cannot file an individual state return, unless they file a federal individual return. This forces the taxpayer to file a federal individual return

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[6] 33 Am. Jur. 2d, Partnerships, Section 1504, p. 378, states:

> "An organization may be treated as a partnership for tax purposes even though it isn't a partnership under local law. The following have been treated as partnerships: . . . A husband and wife partnership where local law didn't recognize such partnerships.

and loose the benefit of filing a federal partnership return; when same may be advantageous. The Wisconsin income tax law requires consistancy, but it will not accept a splitting of income from the petitioners based upon an individual federal return. The decision of the Court below has not only created confusion but has infringed upon their Federal rights.

Now, if the Court below says that the petitioners should have filed a federal partnership return and then they could have filed a state partnership return, then, its determination that they were not a bona fide partnership is meaningless. If they were a partnership in one case, they are a partnership in the other. The right to file a partnership return is determined by being a partnership before filing, not as a result of filing the partnership return. Neither the respondent, nor the Court below have ever argued that the principle of estoppel is invoked against the petitioners, because they did not file a federal partnership income tax return, and each pay social security self employment tax. The fact that petitioners did not both pay federal self employment tax, was not a tax advantage to them. It would have been a benefit for each to have paid same, especially since they were both about 50 years old and would qualify for social security payments, at age 62. Also, the Wisconsin Income Tax paid by the petitioners by the method they filed their tax, was exactly the same as if they had filed a federal and state partnership tax return. The Court below should be asked to make a decision that would prohibit this infringement of a federal right and stop the confusion that has been created. As in *Schmidt v. Lessard*, 349 F. Supp. 1078 (1973), Case No. 73-568, wherein this Court vacated the

judgment of the District Court by per curiam decision dated July 14, 1974, this Court should eliminate the confusion created by the Court below that may cause an individual to forfeit his Fourteenth Amendment guarantees.

NO RATIONAL REASON TO REQUIRE EXISTENCE OF BONA FIDE PARTNERSHIP

No Wisconsin Statute nor administrative rule, requires that a husband and wife be a bona fide partnership before they can split their income received from jointly owned property, whether it be a farm business or otherwise. We ask the respondent's attorneys to cite to the Court that statute that requires a husband and wife to be a bona fide partnership or file a partnership tax return in order to split the income from their jointly owned property or business.

In *Hoeper*, supra, this Court found a Wisconsin statute that provided that the income of a wife should be added to that of the husband, thereby resulting in additional tax to the husband, was unconstituitonal. A wife's income, under the Wisconsin Married Women's Act is as much hers when derived from jointly owned property as it is when derived from solely owned property. The Court below has cited no basis to sustain the validity of its decision. No reference has been made to loss of revenue or prevention of evasion. Neither of which would justify the arbitrary, discriminatory treatment of the petitioners by the Court.

The Court below has created the law that has resulted in the above mentioned inequities and discriminations,

without any sound basis upon which to justify same. There has been no allegation of estoppel of law argued against the petitioners.

This case is not the situation where the real estate and farm personal property is in the husband's name alone, and the wife works in his business. The Wisconsin Married Women's Act at Section 246.05, Wis. Stats., specifically denies the wife the right to compensation for labor performed for her husband, but in this case the farms were in both names and petitioners had an agreement between them that they would "hold" and "own" everything together, this included the farm income, which was placed in their joint account, thereby confirming the ownership thereof and their agreement.

The classification of husbands and wives engaged in the same business on a different basis than husbands and wives engaged in separate businesses, is unreasonable, arbitrary and in violation of equal protection. A classification treating income from a farm different from income from other real property is likewise unreasonable, arbitrary and in violation of equal protection.

A Federal Partnership Return must be filed in order to file a Wisconsin Partnership Return. Therefore, whether a partnership exists is dependent upon federal tax law.

In *Evans v. Commissioner of Internal Revenue* (1971), 447 F. 2d 547, pp. 550-557 (Seventh Cir.) the Court stated:

> "For federal income tax purposes, Federal Tax law is controlling, Lodi Iron Works, Inc., 1958, 29 T.C. 696, and the legality, or lack of thereof, of a partnership under State law does not determine whether a partnership exists for federal tax purposes, Rev. Rul.

58-243, Cum. Bull, 1958-1, 255; Beulah H. Nichols, 1959, 32 T. C. 1322, 1330. . . .

. . . Sec. 704 (e) (1) derives unchanged from Sec. 3797 (a) (2) of the 1939 Code which is a general definition applicable to all partnerships and provided (as Sec. 704 (e) (1) now does) that a person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor whether or not such interest was derived by purchase or gift from any other person.

As the Court held in Poggetto v. United States (N. D. Calif. S. D., 1961) 193 F. Supp. 688, 689 affd. 9 Cir. 1962, 306 F. 2d 76, income from property is attributable to its owner and this principle is equally applicable to non-family and family arrangements as well as partnerships involving some members of a family and other non-related partners. If the corporation's ownership is real then the subjective intent of the parties is not a determinative test.

The test is no longer whether the parties acted in good faith with a business purpose in joining together to conduct a partnership business. This was the test set forth in Commissioner (of Internal Revenue) v. Culbertson, 337 U. S. 733, 69 S. Ct. 1210, 93 L. Ed. 1959 (1949), which was decided before present Sec. 704 (e) (1) was part of the Code.

The Committee report accompanying H. R. 4473 which became Sec. 704 (e) (1) states: . . . The emphasis has shifted from 'business purposes' to ownership of a capital interest. Pflugradt v. United States, 7 Cir., 1962, 310 F. 2d 412, 415.

The Commissioner contends that Sec. 704 (e) (1) was added not to overrule Culbertson but to clarify

confusion as to whether a member of a family partnership would be recognized as a partner for tax purposes where he contributed no capital but received his share by gift, and not where the other partners' consents were lacking. The present test, according to the Commissioner, is whether the parties intend to join together in conduct of the enterprise."

When the Wisconsin Tax Appeals Commission made a Finding of Fact that the petitioners had an understanding that they would hold and own everything together, manage the farm together, and that the wife did as much or more farm work than the husband, the Wisconsin Married Women's Act required the Court to accept her as an equal to him in all respects.

IRREBUTTABLE PRESUMPTION EXISTS

If a classification of taxation is based upon whether or not a bona fide partnership exists or if a partnership tax return was filed, petitioners would be faced with an irrebuttable presumption making it impossible to prove that they each owner or earned the income on an equal basis. Practically all income from husband and wife joint property would not qualify as income from a bona fide partnership as defined by the State Uniform Partnership Act.

The Court below in its decision stated, "We likewise do not subscribe to the wisdom of income tax treatment of married persons in Wisconsin. We would prefer the federal system as it applies to married individuals. However, that is a matter for the legislature." Petitioners are

not arguing about the policy of community property laws or all married persons splitting their income for tax purposes. Truly, that is a legislative question. But, the right of married persons that own, operate and manage a business as a team to split that income and own same equally for tax purposes, is a different matter. The Wisconsin Court created the law preventing same, based upon the archaic common law, that when a man and woman get married they become one, and the man is that one. Even if the legislature enacted a law correcting the Court's decision, it could only apply from the date of the enactment, and all of those married persons that have qualified as a team in the past could not claim their lawful rights of ownership for the accumulations of property in the past. A Court decision would give them these rights for not only the future, but for the past also.

The Court below in its decision states, "Proof as to the fourth element of the partnership—the division of profits —is also insufficient to show the existence of a bona fide partnership". (App. 8) This was based upon the Wisconsin Uniform Partnership Act, not upon a husband and wife partnership for federal tax purposes. Yet, the Court below and the Department (see the stipulation) allow and require a husband and wife to split the interest, rents, dividends and capital gains from a joint account or joint ownership. But, for the petitioners, the fact they had a joint account denied them the right to split their income. If the Court or the Department do not have a logical constitutional reason for this distinction between tax payers or for requiring the proof of the existence of a bona fide partnership, then, the decision of the Court below is un-

equal protection and the taking of property without due process.

We agree with the Court below that "the Wisconsin income tax is modeled upon the federal system . . . (App. 4) but we do not agree that the partnership requirements of the federal system are dependent upon the existence of a bona fide partnership as defined in the Wisconsin Uniform Partnership Act, which it looked to for guidance. (App. 6)

Irrebuttable presumptions in tax law are looked upon with extreme disfavor by the Courts. For example, when legislatures initially passed gift and inheritance tax laws, such usually provided that the inheritance tax was levied at a higher rate than gift tax. Then in order to prevent evasion of the higher tax by gifts made shortly prior to death, the statutes provided that any gift made after a certain time prior to death would automatically be treated as a bequest. These statutes were held unconstitutional because the persons affected were not permitted under any circumstances to prove that a gift actually occurred. *Heiner v. Connan* (1932), 285 U. S. 312, 327-29.

In *Heiner*, at pp. 327-329, the Court stated:

> "The presumption here excludes consideration of every fact and circumstance tending to show the real motive of the donor. The young man in abounding health, bereft of life by a stroke of lightning within two years after making a gift, is conclusively presumed to have acted under the inducement of the thought of death, equally with the old and ailing who already stands in the shadow of the inevidable end. And although the tax explicitly is based upon the circumstance that the thought of death must be the

impelling cause of the transfer (United States v. Wells, supra, 283 U. S. 118, 51 S. Ct. 446, 75 L. Ed. 867), the presumption, nevertheless, precludes the ascertainment of the truth in respect of that requisite upon which the liability is made to rest, with the result, in the present case and in many others of putting upon an estate the burden of a tax measured in part by the value of property never owned by the estate or in the remotest degree connected with the death which brought it into existence. Such a statute is more arbitrary and less defensible against attack than one imposing arbitrarily retroactive taxes, which this Court has decided to be in clear violation of the Fifth Amendment. . . . To sustain the validity of this irrebuttable presumption, it is argued, with apparent conviction, that under the prima facie presumption originally in force there had been a loss of revenue, and decisions holding that particular gifts were not made in contemplation of death are cited. This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty, a new and startling doctrine, condemned by its mere statement, and distinctly repudiated by this Court in the Schlesinger (270 U. S. 240, 46 S. Ct. 260, 70 L. Ed. 557, 43 A. L. R. 1224) and Hoeper (284 U. S. 217, 52 S. Ct. 120, 76 L. Ed. 248) cases involving similar situations. Both emphatically declared that such rights were superior to this supposed necessity."

RIGHT TO SPLIT FARM INCOME SHOULD BE EXTENDED TO PETITIONERS

The only difference in classification in this case is that despite both husband and wife being equal by law, one husband is taxed on the income of his wife that was owned and earned jointly with him, and the other is not taxed on the income of his wife that is owned by her alone or earned by her from separate income. Both have the same family obligations but one family receives a tax preference. The tax benefit provided should be extended to those who should have been included. For example, in *Moritz v. Commissioner of Internal Revenue* (1972), 468 F. 2d 466, 470 (10th Cir.), the Court held that Section 214 of the Internal Revenue Code was unconstitutional because it denied an unmarried man a deduction for the care of his aged mother while granting a deduction to women and married men:

> "Third, we must determine the effect of the invalidity of provisions denying the deduction to men who have never married. Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory under-inclusion as generally invalid, or whether to extend the coverage of the Statute. See Skinner v. Oklahoma, 316 U. S. 535, 542, 543, 62 S. Ct. 1110, 86 L. Ed. 1655; Welsh v. United States, supra, 398 U. S. at 361, 90 S. Ct. 1972 (Harlan J., concurring). Here, extending the coverage of the deduction provisions seems logical and proper, in view of their purpose and the broad separability clause in the act. 26 U. S. C. A. Sec. 7852 (a). We conclude that the challenged provision in Sec. 214 is invalid and should be denied application, and that the benefit of

the deduction generally provided by the statute should be extended to the taxpayer."

The Court's duty in such cases is to determine in its discretion a proper result, a result which would be least burdensome upon the statute considering the nature of the legislation and the purpose of the exemption. See *Welsh v. United States* (1970), 398 U. S. 333, 361-671 (Harlan J., concurring).

We are not asking the Court to extend this privilege to all businesses in which the real estate used therein is owned jointly by the husband and wife, but in which the husband is the sole manager and operator, and the wife does not participate materially in any manner, except ownership. There would be, however, a good deal of merit in such an argument especially where the capital interest is admittedly a material income producing factor.

REASONS PETITIONERS DID NOT FILE FEDERAL PARTNERSHIP RETURNS

The petitioners did not file a federal partnership return because federal law allows them to split their income for tax purposes without regard to who owns or earns the income. They could not file a state partnership return without filing a federal partnership return. Prior to 1966 they had always split their farm income on the combined tax return without filing a partnership return and the Department had never questioned it. No Wisconsin statute had required them to file a partnership return in order to split their farm income. There was no reason for

them to submit to extra legal expense to file a partnership return, when it afforded no additional benefits.

SUMMATION OF ARGUMENT

It is an undisputed fact that the petitioners own all the real property as joint tenants, and that all the property used in the farm operation was purchased from their joint checking account. The ownership of intangible personal property is determined by those people that have an interest therein and possess the property. Ownership by or between one of two living people or both of them can only be determined by those people. The petitioners agree that they owned and held all property together as joint tenants. The Courts are duty bound to accept their decision. It is also an undisputed fact that the petitioners managed and worked the farms on an equal basis. Income is produced from ownership, management and work. There are no other factors to be considered. Therefore, each petitioner owned one-half of the income of the farm operation as his or her separate property.

A close look at Wisconsin's Joint Property Act and Married Women's Act reveals that the one-half of the farm income is her separate income. Section 707.17 (2) (Supra 5) determined that the petitioners had an equal interest in the whole property that they owned as joint tenants. Section 246.01 (Supra 4) determined that one-half of their real estate held in joint tenancy and one-half of the income thereof is the whole and separate property of the wife as if she were unmarried. Section 246.03 (Supra 4) guarantees this same right to her for all property, and

Section 246.15 (Supra 5) extends equal rights "in all other respects" to the wife. It also charges the Court with the duty to make all necessary rules and provisions to carry out the intent and purpose of this section.

The application of these Wisconsin statutes and the facts of the case make the one-half of the farm income of the petitioners the separate income of the wife. The decision of this Court in *Hoeper* made it unconstitutional for the Wisconsin legislature to enact a law that added the separate income of the wife to the income of the husband. In this case, the Court below added the separate income of the wife to the income of the husband. The Court should not be allowed to do that which was unlawful to be done by the legislature. You cannot legally tax the husband for income he did not receive. In this regard *Hoeper* states:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. Compare Nichols v. Coolidge, 274 U. S. 531, 540, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081."

See also, *Harkness v. United States*, 469 F. 2d 310 (1972), and *Lewis v. White*, 56 F. 2d 390, D. Mass. (1932), Appeal dismissed 61 F. 2d 1046 (1st Cir. 1932).

The requirement that the petitioners prove a bona fide partnership under the Wisconsin Uniform Partner-

ship Act has no logical or rational basis, especially when all other joint owners of Wisconsin income can split same on their Wisconsin Combined Income Tax Return (which is what the petitioners did) without filing a partnership tax return or proving a bona fide partnership. When the petitioners split their income on the tax return it showed their intent to establish equal ownership the same as other taxpayers were allowed to do. The right to split the farm income between the petitioners should be extended by this Court to the petitioners. This would remedy the quandary of hundreds of Wisconsin couples that are ignorant of or confused by the requirements of the Court below to the extent that they do not know how to qualify for their separate property rights and are therefore denied these rights. The drafting of costly partnership agreements and partnership tax returns does not change their property status or the ownership of their income.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the mandate of the Supreme Court of Wisconsin.

Respectfully submitted,

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MICHAEL RODAK, JR.

APPENDIX

In The

SUPREME COURT of the UNITED STATES

October Term, 1973

No. 73-1268

EUGENE H. SKAAR and
ELLEN SKAAR, his wife,

Petitioner,

v.

WISCONSIN DEPARTMENT OF
REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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OPINION OF SUPREME COURT OF WISCONSIN

No. 293

August Term, 1973

STATE OF WISCONSIN : IN SUPREME COURT

Eugene H. Skaar et al.,
Respondents,

v.

Wisconsin Dept. of Revenue,
Appellant.

APPEAL from a judgment of the circuit court for Dane County, GEORGE R. CURRIE, Reserve Circuit Court Judge, Presiding. *Reversed.*

This is a proceeding under Ch. 227, Stats., to review a decision of the Wisconsin Tax Appeals Commission (hereinafter, the "Commission") dated March 20, 1972, which denied the petitioner Eugene H. Skaar's application for abatement of an additional assessment of state taxes made against him for the years 1966, 1967 and 1968.

Eugene and Ellen Skaar (hereinafter, the "taxpayers") had, for the years in question, been engaged in a farming enterprise. Claiming to be a husband and wife partnership, the taxpayers divided the farm income between themselves and filed for tax purposes accordingly. The Wisconsin Department of Revenue audited said returns and determined that no partnership existed. They ruled that Mr. Skaar operated the farms as a sole proprietorship. An additional assessment for the income allegedly earned by Mrs. Skaar was made against Eugene Skaar.

The taxpayer applied to the Department of Taxation for an abatement of the additional income tax assessment and upon denial thereof appealed to the Commission.

The Commission took testimony and on March 30, 1972 determined that no partnership existed. The denial of the application for abatement of the additional assessment was affirmed.

On review pursuant to Ch. 227, Stats., the circuit court reversed the decision of the Commission. The Wisconsin Department of Revenue appeals from the judgment.

The facts material to a determination of the existence of a partnership are as follows: Eugene H. Skaar and his wife, Ellen, were married in 1942. Eugene returned from military service in 1945 and began farming with his brother. Prior to the death of his father in 1957, the taxpayer and his brother rented two farms on a share basis from his father. The taxpayer continued farming with his brother for several years thereafter, sharing with his father's estate. After the taxpayer and his brother discontinued their partnership, the taxpayer remained and, with the continuing help of his wife, cultivated the two farms: one of the farms being rented from his mother and the other farm from his father's state. In 1966 the taxpayer and his wife executed a land contract for the purchase, as joint tenants, of the farm held by his father's estate. In 1967, the Skaar's executed another land contract purchasing, as joint tenants, the farm he previously rented from his mother.

The taxpayers handled all financial dealings through one joint account. All farm receipts were deposited therein as was the salary earned by Mr. Skaar as Town Chair-

man and Drainage District Commissioner. Likewise, all farm expenses were paid therefrom as were all family expenses. The financial records of the taxpayers' farm and non-farm operations were kept by Mrs. Skaar. Such records failed to reflect any division of profits resulting from such operations. Rather, income from the farm and non-farm operations was reflected as a singular amount—net income.

The taxpayers never entered into a formal partnership arrangement. Rather, the Skaars testified as to an informal arrangement which existed between them. This understanding was stated in the Commission's Finding of Fact as follows:

> "The petitioner and his wife had an oral understanding as to the conduct of the farming operations; and that understanding was that they would work together, own everything together, make their decisions together, manage the farm together, and that they would hold everything together. It was their understanding that if one of them died, the other would have everything, to the exclusion of their children. It was their understanding that if either one of them were away from the farm, the other could do anything necessary to be done and transact business until the other returned."

No federal or state partrnership tax returns were filed and self-employment social security taxes were paid only for Mr. Skaar. Mr. Skaar testified that such action was taken to secure better social security benefits. Additionally, claims for gasoline tax refunds were made by Mr. Skaar individually. The taxpayer testified that such action was taken only because the invoices for the sale of

gasoline were made out in his name. The registered cattle on the farm were registered in the name of Mr. Skaar individually. He testified that this was done for convenience. Similarly, for the years involved, the automobiles and trucks were registered in the taxpayer's name only—this being done only for insurance purposes.

Contrawise, it was undisputed that Mrs. Skaar supplied numerous services in the successful operations of the farm. Similarly, the milk check—the main farm income—was made payable to both taxpayers. Decision making in the farm management was done jointly and Mrs. Skaar had the authority to manage the farm affairs.

HANLEY, J. The sole issue is whether the Wisconsin Tax Appeals Commission erred in affirming the Department of Revenue's denial of the taxpayers' application for abatement of the additional income tax assessment by concluding that, as a matter of law, no bona fide partnership existed.

While the Wisconsin income tax is modeled upon the federal system, the personal income tax treatment of married individuals under the federal and Wisconsin tax provisions is dissimilar. Under the federal system, married individuals are permitted to file a joint return and effectively split their income even though all income and deductions belong to only one spouse.[1] Wisconsin, on the other hand, while permitting married individuals to file

[1] 26 U.S.C.A. Sec. 6013.

jointly, taxes each spouse individually on his income and deductions and income splitting is not allowed.[2]

As a result of such treatment under the Wisconsin income tax, taxpayers attempted through numerous devices to achieve an income tax splitting similar to that allowed under the federal system. One of these devices was the family or husband-wife partnership. By availing himself of this device, the taxpayer who at that time was a sole proprietor of a business would form a partnership with his wife. Since partnership income is taxed to the partners and not the partnership itself, a taxpayer could, by making his wife or another family member his partner, effectively split his income and realize a result similar to that of the federal joint tax return.

The family partnership was, prior to a statutory definition thereof in 1950,[3] an often litigated tax saving device. Such litigation arose primarily because of suspicion generated as to the bona fideness of such inter-family transactions. As a result, the federal courts closely scrutinized each individual transaction.

> ". . . transactions between husband and wife calculated to reduce family taxes should always be subjected to special scrutiny." *Commissioner of Internal Revenue v. Tower* (1946), 327 U. S. 280, 291, 66 S. Ct. 532, 90 L. Ed. 670.

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[2]This court ruled in *Amerpohl v. Tax Comm.* (1937), 225 Wis. 62, 272 N. W. 472, that Wisconsin's income tax provisions as per joint returns —Sec. 71.09 (4), Stats. of 1937—were unconstitutional as written. The legislature has since failed to enact a provision for filing joint returns similar to the federal system.

[3]26 U.S.C.A. Sec. 704 (e)

We concur with this rationale and shall closely scrutinize the alleged partnership here present so as to determine whether or not for Wisconsin income tax purposes a bona fide partnership exists.

Since Wisconsin has adopted the Uniform Partnership Act,[4] we must initially look there for guidance. Sec. 178.03 (1), Stats. defines a partnership as an "association of 2 or more to carry on as co-owners a business for profit." More specifically, it is recognized that four elements need be met so as to qualify as a partnership. Initially, the contracting parties must intend to form a bona file partnership[5] and accept the legal requirements and duties emanating therefrom. Secondly, there must exist a community of interest in the capital employed.[6] Thirdly, there must be an equal voice in the management of the partnership.[7] Finally, there must be a sharing and distribution of profits and losses.[8] Applying these elements to the case at bar, we hold that a bona fide partnership was not created. While the taxpayers may have desired to create a marital financial relationship similar to a partnership, it is clear that they did not intend to create a bona fide partnership.

Initially, the parties to a partnership must intend to contractually form the legal relationship of a partnership. Such an intent is not shown here. While the W.T.A.C. found that the parties had reached an oral understanding, such oral understanding does not show the necessary intent.

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[4]Ch. 178, Stats.

[5]*Anderson v. Anderson* (1972), 54 Wis. 2d 666, 196 N. W. 2d 727.

[6]*Thomas v. Department of Taxation* (1947), 250 Wis. 8, 26 N. W. 2d 310.

[7]Sec. 178.15 (5), Stats.

[8]*Thomas v. Department of Taxation, supra*

The oral understanding is more consistent with their marital relationship than with the existence of a bona fide partnership.

There do exist many indications that the taxpayers did not intend to create a bona fide partnership. They did not file partnership tax returns as required both federally and in Wisconsin. We think that if the taxpayers had intended to form a bona fide partnership they would not have violated the federal[9] and Wisconsin [10] legal requirement of filing. Likewise, the taxpayers failed to pay the federal self-employment tax for Mrs. Skaar which would have been required had said business arrangement been a partnership.[11] Such tax surely would have been paid had the taxpayers intended to form a partnership and fulfill the legal requirements. The record discloses they were familiar with such requirements.

There were other indications the taxpayers did not intend to form a partnership. There was no automobile liability insurance coverage for Mrs. Skaar even though had a bona fide partnership been created, Mrs. Skaar would be liable for the tortious acts of her partner.[12] Similarly, the books of the farm operation were not kept in a manner consistent with a bona fide partnership in that there was no division of the farming operation profits between the taxpayers. In fact, the lower court found that the taxpayers did not consider themselves partners in a legal sense.

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[9]26 U.S.C.A. Sec. 6031.

[10]Sec. 71.10 (3), Stats. Such a return is also required of joint venture. Sec. 71.02 (2) (i), Stats. and 26 U.S.C.A. Sec. 761 (a).

[11]26 U.S.C.A. Secs. 702 (a) and 1402 (a).

[12]Sec. 178.10, Stats.

The taxpayers argue that their desire to own everything together—their holding both farms in joint tenancy and their expressed desire to hold whatever personalty they own similarly—established the fact that they intended a partnership. Such is not the case. A partnership is not implied merely from a common ownership of property.[13] The facts that the community recognized Mrs. Skaar as possessing the authority to bind the farming enterprise and that Mrs. Skaar helped manage and operate the farm are not in themselves controlling. Such facts are as common to a marital relationship as they are to a partnership. Further, whatever testimony that is adduced as to the agreement itself is necessarily self-serving.

Proof as to the fourth element of the partnership—the division of profits—is also insufficient to show the existence of a bona fide partnership. In fact, there was no proof whatsoever that the taxpayers agreed to divide and did in fact distribute the profits of the farming enterprise. The fact that the account books fail to show any division of profits between the taxpayers creates an inference that the taxpayers never intended to so distribute said profits. Similarly, the joint account into which all receipts, farm and other income were deposited is consistent with the relationship the taxpayers intend—that of marriage and not of partnership.

Consistent with our finding that the relationship in question was not a bona fide partnership, we likewise hold that their relationship failed to qualify as a joint venture

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[13]Sec. 178.04 (2), Stats.; *Anderson v. Anderson, supra.*

because of the scope and period of time which such relationship encompasses.[14]

The taxpayer was assessed aditional taxes by the Department of Revenue because it believed that the farm related income split by the taxpayers on their Wisconsin return was attributable solely to Mr. Skaar. This was because the Department determined the business relationship not to be that of partnership, but of a sole proprietorship. In *Woller v. Department of Taxation* (1967), 35 Wis. 2d 227, 151 N. W. 2d 170 we held that the burden of proof was upon the taxpayer to show the additional assessment to be erroneous. Based upon the evidence adduced at the administrative hearing, the W.T.A.C. concluded that a partnership did not exist and that the taxpayers had not met their burden of proof. We think the facts upon which the Commission's conclusion of law was based are clearly supported by substantial evidence in view of the record submitted.

The respondents raised multiple issues in their brief of which an answer was not required so as to decide the controlling question involved. We have not deemed such questions inappropriate. We likewise do not subscribe to the wisdom of income tax treatment of married persons in Wisconsin. We would prefer the federal system as it applies to married individuals. However, that is a matter for the legislature.

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[14] C. f. *Insurance Company of North America v. Department of Industry, Labor and Human Relations* (1970), 45 Wis. 2d 361, 173 N. W. 2d 192; *Estate of Starer* (1963), 20 Wis. 2d 268, 121 N. W. 2d 872; *Bowers v. Treuthardt* (1958), 5 Wis. 2d 271, 92 N. W. 2d 878.

We conclude that on the facts of this case the taxpayers have failed to establish that they have in fact formed a bona fide partnership.

By the Court: - - - Judgment is reversed and cause remanded with directions to affirm the decision of the Wisconsin Tax Appeals Commission.

No. 293

August Term, 1973

STATE OF WISCONSIN : IN SUPREME COURT

Eugene H. Skaar and
Ellen Skaar, his wife,
Respondents,

v.

Wisconsin Department of
Revenue,
Appellant.

BEILFUSS, J. (dissenting) I respectfully dissent and believe the judgment of the circuit court should be affirmed.

Mr. and Mrs. Skaar, just like any other taxpayer, have a right to report their income for tax purposes in a manner most advantageous to them, provided, of course, their report is consistent with the truth.

I fully agree with the majority that:

". . . transactions between husband and wife calculated to reduce family taxes should always be subjected to special scrutiny. . . ." *Commissioner of Internal Revenue v. Tower* (1946), 327 U. S. 280, 291, 66 Sup. Ct. 532, 90 L. Ed. 670.

As I review the record, the facts do not lead to the conclusion that Mr. and Mrs. Skaar were attempting by design or artifice to create records or impressions for the purpose of avoiding the tax laws. Their everyday activities demonstrate their intention as clearly, if not more so, than a formal lawyer-like agreement.

As observed by the circuit court:

"Mrs. Skaar does a very substantial amount of farm labor each day. Twice a day she participates in the milking and feeding of the herd; takes care of the chickens; bales hay, drive the baler, and unloads hay; prepares the tobacco seed bed, planting the plants, helps with the tobacco harvest and with the stripping; and drives tractors. She estimated that probably she put in 12 hours per day doing farm labor. Mr. Skaar is town chairman and chairman of the county drainage board which duties take him away from the farms considerably so she probably put in more farm labor than he does. The commission, by its Finding of Fact, No. 8, found that Mrs. Skaar 'spent as much time or more than did the petitioner in the conduct of the farming operations.'

"Decision making in the management of the farms is done jointly by the Skaars after talking things over, such as buying new machinery, or when to sell the tobacco crop.

"The sale of milk constituted by far the greater portion of the gross farm income of the Skaars for each of the three years in question as shown by the income tax returns. In 1966 it accounted for $24,666.07 of a total of $33,884.95; in 1967, $28,551.83 of a total of $35,417.38; and in 1968, $32,733.22 of a total of $40,606.23. During these three years, and for some time prior thereto, the milk checks received have been payable to both Mr. and Mrs. Skaar with an 'or' between their names. These as well as all other farm income are deposited in the one joint checking account. On the other hand, the checks for sale of cattle are made to him. Bills for farm expenses most generally came made out to Mr. Skaar alone but Mrs. Skaar pays them."

The circuit court then concluded in its memorandum opinion:

> "If the arrangement between Mr. and Mrs. Skaar was not technically a partnership, then no partnership information return probably was required because sec. 71.10 (3) (a), Stats., does not appear to cover joint ventures. In any event, the Skaars employed an attorney to prepare their income tax returns for the three years in question and it was his judgment, not theirs, which resulted in not filing partnership returns. It would be wholly unreasonable for the Commission to infer from such failure that the Skaars were not engaged in a joint venture whereby they were equal co-owners of all income derived from such venture.
>
> "The Court finds that no rational basis exists for the Commission's legal conclusion that the Skaars did not conduct their farming operations either as a partnership or a joint venture."

I agree and would affirm.

I am authorized to state that Mr. Justice ROBERT W. HANSEN joins in this opinion.

MEMORANDUM DECISION OF
WISCONSIN CIRCUIT COURT

STATE OF WISCONSIN CIRCUIT COURT — DANE COUNTY

EUGENE H. SKAAR and
ELLEN SKAAR, his wife,
Petitioners,

vs.

Case No. 136-066

WISCONSIN DEPARTMENT OF
REVENUE,
Respondent.

MEMORANDUM DECISION

BEFORE HON. GEORGE R. CURRIE,
Reserve Circuit Judge.

This is a proceeding under Ch. 227, Stats., to review a decision of the Wisconsin Tax Appeals Commission (hereafter the "Commission") dated March 20, 1972, which denied the petitioner Eugene H. Skaar's application for abatement of an additional assessment of state income taxes made against him for the years, 1966, 1967 and 1968.

Mr. Skaar was a farmer by occupation and he and Mrs. Skaar had filed their state income tax returns on the combined form for use of husband and wife in which the income of each subject to tax is stated separately and taxed separately. In these returns the farm income was divided equally between the two. The basis of the additional assessment was to tax all of the farm income to Mr. Skaar.

STATEMENT OF FACTS

Mr. and Mrs. Skaar had married in 1942 when each was 20 years old. They have three children, the youngest of whom was aged 21 at the time of the hearing before the Commission on June 23, 1971.

They have been farming many years on two adjoining farms which originally belonged to Mr. Skaar's father. Prior to the father's death this farm operation was on a shared rental basis. After the father's death in 1957 the widow owned one farm and the other was owned by a testamentary trust created by the father's will giving either Sr. Skaar, or him and Mrs. Skaar, the right to purchase the same when they were able to do so (Tr. 53). For a few years Mr. Skaar and his brother operated the two farms as renters. Thereafter, in 1960 the brother farmed other lands and Mr. and Mrs. Skaar rented and operated alone these two farms (Tr. 52). They started buying their own machinery (Tr. 52). However, in referring to a barn built in 1958 on the farm he had the option to purchase, Mr. Skaar testified, "I built a barn in 1958 . . . on my own property . . . that I could buy." Nevertheless, in spite of the use of the pronoun "I", the Skaars maintained but one bank account which was a joint checking account in the Cottage Grove State Bank into which all income was deposited (Tr. 18-19, 32, 50). Thus the funds for payment of the barn undoubtedly came from this joint account. Furthermore, Mr. Skaar testified that this rental arrangement was the same joint venture arrangement between Mrs. Skaar and him as existed after they owned the farms (Tr. 65-66).

At least since 1962, and possibly since 1958, the Skaars have split the farm income between them in their Wisconsin income tax returns (Tr. 67).

On August 26, 1966, the Skaars purchased the farm owned by the Thomas Skaar Trust Estate under land contract for $14,050 on the basis of paying $100 down and the balance of $13,950 together with interest at 4 and ½ per cent per annum in monthly instalments of $160 each. It was the understanding that the Skaars were purchasing the same as joint tenants but through inadvertence Mrs. Skaar's name was omitted as a co-purchaser. This was corrected by re-executing the contract on June 23, 1971, so as to have the contract run to Eugene H. Skaar and Ellen S. Skaar, his wife, as joint tenants. Finding of Fact No. 5 of the Commission's decision finds that the Skaars did purchase in 1966 as joint tenants.

Mr. Skaar testified that he thought when they purcased the farm from the trust the rent stopped as to the second farm owned by his mother and a verbal agreement was made that the Skaars would purchase it but the papers were not made out until the following year (Tr. 60-61). The land contract for the purchase of this other farm is dated March 1, 1967, and names Eugene H. Skaar and Ellen S. Skaar, his wife, as joint tenants, as the purchasers (Ex. H). The purchase price was $21,000 payable $1,000 down and the balance of $20,000 payable in semiannual payments of $500 together with interest at 4 and ½ per cent per year.

Mrs. Skaar does a very substantial amount of farm labor each day. Twice a day she participates in the milking and feeding of the herd, takes care of the chickens;

bales hay, drives the baler, and unloads hay; prepares the tobacco seed bed, planting the plants, helps with the tobacco harvest and with the stripping; and drives tractors (Tr. 17, 20, 27-28, 75, 79). She estimated that probably she puts in 12 hours per day doing farm labor (Tr. 81). Mr. Skaar is town chairman and chairman of the county drainage board which duties take him away from the farms considerably so she probably put in more farm labor than he does. The commission, by its Finding of Fact No. 8, found that Mrs. Skaar "spent as much time or more than did the petitioner in the conduct of the farming operations."

Decision making in the management of the farms is done jointly by the Skaars after talking things over, such as buying new machinery, or when to sell the tobacco crop (Tr. 23, 79).

The sale of milk constituted by far the greater portion of the gross income of the Skaars for each of the three years in question as shown by the income tax returns (Exs. 4, 5 and 6). In 1966 it accounted for $24,666.07 of a total of $33,884.95; in 1967, $28,551.83 of a total of $35,417.38; and in 1968, $32,733.22 of a total of $40,606.23. During these three years, and for some time prior thereto, the milk checks received have been payable to both Mr. and Mrs. Skaar with an "or" between their names (Tr. 12, 48). These as well as all other farm income are deposited in the one joint checking account (Tr. 12, 36, 49). On the other hand, the checks for sale of cattle are made out to him (Tr. 49). Bills for farm expenses most generally came made out to Mr. Skaar alone but Mrs. Skaar pay them (Tr. 69-70).

Claims for gasoline tax refunds have been made by Mr. Skaar only because the invoices for the sale of the gasoline had been made out in his name (Tr. 43-45).

As part of the joint federal income tax return filed by Mr. and Mrs. Skaar for each of the three years in question, Schedules F-1 covering self-employment Social Security were completed and in them there was apportioned to Mr. Skaar all of the farm net income upon which was paid the Social Security taxes due (Tr. 21-22). Mr. Skaar testified that he had advice from his attorney, Mr. Schneider, in so doing, and that it was his advice to do it that way so as to receive one good income rather than two mediocre ones (Tr. 22-23).

Titles to the motor vehicles owned are in Mr. Skaar's name alone (Tr. 20-21, 41). Mr. Skaar gave this explanation for having title in his name only (Tr. 21):

> "My insurance man tells me that if we have our vehicles joint, if I were driving and my wife was hurt in an accident through my misdemeanor or calculation or whatever, my insurance would cover her; but if we were joint, she would not be covered except on a very small medical policy. For that reason, we have always kept it just in one name, more or less for convenience and for the protection of my wife."

The cattle on the Skaar farms were registered cattle and they were registered in Mr. Skaar's name which was "for convenience sake" (Tr. 39). He gave this explanation of why the cattle were registered in his name alone (Tr. 64):

> "For instance, our cattle registrations. It gets real detailed when you have got to make out transfers and

all this stuff. It's the simplest thing to be an agent to do it. I know big companies that deal in agents and one person is allowed to do it for a whole group. You're only authorized one person to sign. Even if you register something, it has to be an authorized signature. For this reason I don't think there should be two people to sign. It couldn't be."

Mrs. Skaar kept all the farm records and accounts (Tr. 19, 82-83). In her account books the net income is shown in one amount with no division of income between the two (Tr. 83). However, she was asked this question in connection with such record-keeping and gave this answer (Tr. 87):

"Q Now, as to what your farm accounts are, when you're handling the farm accounts, if you were to say who was the ownership of this farm account system, what would be your answer? Whose farm account is it?

A Eugene and Ellen Skaar."

The Skaars also receive rentals from some houses which are owned in joint tenancy. In Mrs. Skaar's bookkeeping, rentals were kept in one account, the same as the farm income, and not split in two between them (Tr. 87), although divided between them in the income tax returns. The department has not questioned that half of these rentals were properly reported as the income of Mrs. Skaar.

Mr. Skaar received some income as town chairman and drainage commissioner, and this was also deposited in the joint bank account (Tr. 89). The income from

these sources as reported in the income tax returns were $794.12 in 1966; $315.98 in 1967; and $192.11 in 1968.

It is conceded that the Skaars never filed any partnership information income tax returns, nor did they ever enter into a formal partnership agreement. However, they had an oral understanding between them which is stated in the Commission's Finding of Fact No. 10 as follows:

> The petitioner and his wife had an oral understanding as to the conduct of the farming operations; and that understanding was that they would work together, own everything together, make their decisions together, manage the farm together, and that they would hold everything together. It was their understanding that if one of them died, the other would have everything, to the exclusion of their children. It was their understanding that if either one of them were away from the farm, the other could do anything necessary to be done and transact business until the other returned.

The Court's Decision

The concluding finding of fact (Finding of Fact No. 28) of the Commission was:

> The farm business in question was not conducted by the petitioner and his wife as a farm business partnership or a farm business joint venture; said business was conducted by the petitioner as a sole proprietorship with the loyal assistance and cooperation of his wife.

Then as Conclusion of Law No. 1 the Commission held:

> The farm business in question was not conducted by

the petitioner and his wife either in law or in fact as a farm business partnership or a farm business joint venture.

The Court is of the opinion that the above quoted Finding of Fact No. 28 constitutes a conclusion of law and not a true finding of fact in view of the wholly undisputed facts of this record.

It may be, as the Attorney General's brief argues, that the method by which the Skaars conducted their farming operations did not technically constitute a partnership because of the lack of a partnership agreement. See *Thomas v. Department of Taxation* (1947), 250 Wis. 8, 16, 26 N. W. 2d 310; 33 Am. Jur. 2d, Federal Taxation, sec. 1692, p. 492.

Under the verbal agreement that existed between them there was no express mention of sharing losses although that may be implied. In connection with the rental properties they owned a net loss was sustained in 1968 which was divided between them (Tr. 27). Under their method of accounting of farm income any loss would of necessity have been borne equally by them. Furthermore, it was held in *Estate of Starer* (1963), 20 Wis. 2d 268, 271, 121 N. W. 2d 872, that an agreement to share losses will be implied from the sharing of profits in a joint venture situation. If there was no partnership, the Court is satisfied that the method by which the Skaars operated their farm enterprise and disposed of the profits resulted in at least a joint venture.

In 46 Am. Jur. 2d, Joint Ventures, sec. 7, p. 27, it is stated:

"There appears to be substantial agreement that in order to constitute a joint venture, the following factors must be present: a contribution by the parties of money, property, effort, knowledge, skill, or other assets to a common undertaking; a joint property interest in the subject matter of the venture and a right of mutual control or management of the enterprise; expectation of profits, or the presence of adventure; a right to participate in the profits; . . . No specific or formal agreement is required. Whether persons have entered into a joint venture depends largely upon the terms of the particular agreement, upon the construction which the parties have given it, as indicated by the manner in which they have acted under it, and upon the nature of the undertaking, as well as upon other facts."

and at sec. 11, pp. 32-33, the same text goes on to state:

"To constitute a joint venture, the parties must combine their property, money, efforts, skill, or knowledge in some common undertaking. The contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each conventurer of something promotive of the enterprise . . . it seems clear that it is immaterial whether the property involved was individually owned before the joint venture was entered upon or was afterward acquired, so long as it was contributed and devoted to the uses and purposes of the enterprise."

The Court interprets the verbal understanding which existed between Mr. and Mrs. Skaar set forth in the Commission's Finding of Fact No. 10 for owning everything together as covering the farm income. This co-ownership of the farm income made such income as received the

joint property of each. Income from securities or property owned in joint tenancy by two persons is taxed for income tax purposes half to each co-owner, as acknowledged in the stipulation of counsel dated October 13, 1972, on file herein. That is exactly the way the Skaars reported the farm income in the three years in question.

The application that was made of the farm income establishes that Mrs. Skaar benefited as much as Mr. Skaar from such income, except for the part used for family living expenses. The principal and interest payments on the two land contracts and real estate taxes were the obligation of both, and these principal payments enhanced the value of Mrs. Skaar's joint interest in the two farms. Machinery was being purchased from time to time, including eight tractors, and this added to the value of Mrs. Skaar's joint interest in the farm personal property. With respect to the disbursements for living expenses, it could be implied that under their oral agreement that they had agreed to share these equally, and in practice this is what they did.

This is a very different situation from the facts in the recent case of *Acker v. Wisconsin Department of Revenue*, Case No. 135-485, decided by this Court, where an arbitrary division of farm income was made in the income tax return of 75 per cent to the husband and 25 per cent to the wife, and, although the farm income was deposited in a joint account, there was no showing that any of it remained at the end of each year or that any of it had been disbursed so as to benefit the wife financially.

While the Court does not consider it is material whether the checks representing the receipt of farm income

were made payable to Mr. and Mrs. Skaar, or to Mr. Skaar alone, the milk checks representing approximately 75 per cent of the gross farm income were made payable to them as joint payees. However, this method of payment of the milk checks does corroborate Mr. Skaar's testimony that the cattle registration was made in his name alone only for the convenience in making transfers.

The brief of the Attorney General does not attack the credibility of the Skaars and there is nothing in the record to suggest that any of their testimony was untruthful.

The placing of title to the motor vehicles in Mr. Skaar's name alone in order that Mrs. Skaar, if injured while he was driving, might realize benefits from the insurance would probably estop her from claiming to be a co-owner of such vehicles. There is no claim made by counsel for the Skaars that she is such a co-owner of these vehicles. While the placing of title to them in Mr. Skaar alone was a departure from their understanding that they would own everything together, it did not have the effect of destroying the joint venture or requiring that the joint farm income be solely taxed to him.

The Attorney General's brief stresses the fact that bills for farm supplies, including gasoline, were made out to Mr. Skaar alone shows that the Skaars did not hold themselves out to the public as partners. The Skaars apparently did not consider themselves to be partners in the legal sense. They, however, did not conceal the fact that they were operating the farm together on an equal basis as demonstrated by the fact the milk checks were made payable to the both of them.

If the arrangement between Mr. and Mrs. Skaar was not technically a partnership, then no partnership information return probably was required because sec. 71.10 (3) (a), Stats., does not appear to cover joint ventures. In any event, the Skaars employed an attorney to prepare their income tax returns for the three years in question and it was his judgment, not theirs, which resulted in not filing partnership returns. It would be wholly unreasonable for the Commission to infer from such failure that the Skaars were not engaged in a joint venture whereby they were equal co-owners of all income derived from such venture.

The Court finds that no rational basis exists for the Commission's legal conclusion that the Skaars did not conduct their farming operations either as a partnership or a joint venture.

Let judgment be entered reversing the decision of the Wisconsin Tax Appeals Commission here under review.

Dated this 7th day of November, 1972.

/s/ GEORGE R. CURRIE
Reserve Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

EUGENE H. SKAAR and
ELLEN SKAAR, his wife,
Petitioners,

vs. Case No. 136-066

WISCONSIN DEPARTMENT OF
REVENUE,
Respondent.

JUDGMENT

BEFORE HON. GEORGE R. CURRIE,
Reserve Circuit Judge

The above entitled review proceeding having come on for hearing before the Court, George R. Currie, Reserve Circuit Judge, presiding, on the 30th day of October, 1972, at the City-County Building in the City of Madison; and the petitioners having appeared in person and by Attorney Lloyd A. Schneider; and the respondent department having appeared by E. Weston Wood, Assistant Attorney General; and the Court having had the benefit of the oral argument and briefs of counsel; and the Court having filed its Memorandum Decision wherein judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the decision of the Wisconsin Tax Appeals Commission dated March 30, 1972, in the matter of Eugene H. Skaar, Petitioner, vs. Wisconsin Department of Revenue, Respondent, Docket No. I-3299, which denied the petitioner's application for abatement of an assessment of additional income taxes for the

years 1966 through 1968, be, and the same hereby is reversed.

Dated this 7th day of November, 1972.

By the Court:

/s/ GEORGE R. CURRIE
Reserve Circuit Judge

DECISION AND ORDER OF WISCONSIN TAX APPEALS COMMISSION REGARDING APPEAL OF PETITIONERS.

STATE OF WISCONSIN
TAX APPEALS COMMISSION

EUGENE H. SKAAR,

Petitioner

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

DOCKET NO. I-3299

DECISION AND ORDER

(Drafted by Commissioner Finch)

The above-entitled matter having come on to be heard before this Commission; the petitioner, Eugene H. Skaar, having appeared in person and by Lloyd A. Schneider, his attorney; the respondent, Wisconsin Department of Revenue, having appeared by Ralph N. Lazar, its attorney; and being fully advised in the premises, having considered the testimony and evidence presented and having considered the oral arguments of counsel, this Commission hereby finds and decides as

FINDINGS OF FACT

1. This is a timely appeal to this Commission to review the respondent's denial of the petitioner's application for abatement of an assessment of additional income taxes for the years 1966 and 1968. Said additional assessment was made as a result of the respondent's office audit determination wherein the respondent included in the petitioner's Wisconsin total income for each of the years 1966 through 1968 the half of the net farm business income reported by the petitioner's wife in her portion of the combined Wisconsin income tax returns the petitioner and his wife filed for said years.

2. During the years hereunder review, 1966 through 1968, the petitioner was a resident of the State of Wisconsin and was subject to the income tax provisions of Chapter 71 of the Wisconsin Statutes.

3. For a number of years prior to 1957, the petitioner was engaged in farming operations, on a share basis, with his father and brother. Said farming operations were conducted on farm lands owned by the petitioner's father. The petitioner's wife assisted him with his portion of the farm work. The petitioner received 25 per cent of the net profits from said shared farming operations. He deposited his share of said farm profits in a joint account he and his wife had.

4. The petitioner's father died in 1957. Thereafter, until approximately 1960, the petitioner and his brother continued the farming operations on the farm lands previously owned by his father. The petitioner's wife assisted him in his portion of the farming operation and his

brother's wife assisted his brother with his portion of the farming operation, and the petitioner deposited his share of the net proceeds of said farming operations in the joint account he and his wife had.

At some time prior to 1966, the petitioner and his brother discontinued their farm business arrangement and the petitioner continued in the business of farming on a farm he leased from his father's estate and on a farm he leased from his mother.

5. In 1966, the petitioner and his wife entered into a land contract with his father's estate for the purchase, as joint tenants, of a farm held in his father's estate. In 1967, the petitioner and his wife entered into a land contract with his mother for the purchase, as joint tenants, of a farm his mother owned. Said two farms were the farms which the petitioner had previously farmed.

6. During the years hereunder review, 1966 through 1968, the petitioner was engaged in the business of farming on the aforesaid farms.

7. The sole question for determination by this Commission in this matter is whether the petitioner and his wife were engaged in the business of farming as a farm partnership, as a farm joint venture, or whether the petitioner was engaged in the business of farming as a sole proprietor.

8. The petitioner's wife assisted him with most of the types of farm work and farm chores necessary in the conduct of the farm business operations. The petitioner's wife spent as much time or more than did the petitioner in the conduct of the farming operations.

9. The petitioner and his wife did not have a written farm business partnership agreement.

10. The petitioner and his wife had an oral understanding as to the conduct of the farming operations; and that understanding was that they would work together, own everything together, make their decisions together, manage the farm together, and that they would hold everything together. It was their understanding that if one of them died, the other would have everything, to the exclusion of their children. It was their understanding that if either one of them were away from the farm, the other could do anything necessary to be done and transact business until the other returned.

11. The petitioner and his wife continued to maintain their joint checking account (the only bank account they had).

12. The proceeds of the farm business operations were deposited in said joint checking account and the farm business expenses as well as the personal expenses of the petitioner and his wife were paid out of said joint checking account.

13. During the years hereunder review, the petitioner was the Chairman of the Town of Cottage Grove and a member of the Dane County Drainage Board. He deposited his checks from those positions in the joint checking account.

14. During the years hereunder review, the petitioner and his wife had jointly owned rental properties and they deposited the net rents from such properties in their joint checking account.

15. The farm business expenses were billed to the petitioner in his name alone. Gasoline refunds were made payable to the petitioner in his name alone. Checks for the sale of livestock were made payable to the petitioner in his name alone. The registered cattle used in the farm business were registered in the petitioner's name alone. The farm trucks and automobiles were registered in the petitioner's name alone.

16. The petitioner and his wife filed Federal joint income tax returns for each of the years hereunder review. The farm income and expenses and net profit of the farm business were reported on Schedule F of said returns.

17. The petitioner filed self-employment Federal social security tax forms for each of the years hereunder review and in said forms he reported all of the net farm business profit as his income.

18. The reverse side of a Federal Form F-1 for each of the years 1966 through 1968 contains the following instruction in regard to partnerships:

PARTNERSHIPS

In computing his combined net earnings from self-employment, a partner should include his entire share of such earnings from a partnership including any guaranteed payments. No part of that share may be allocated to the partner's wife (or husband) even though the income may, under State law, be community income. However, in the case of a husband and wife farm partnership, like other partnerships, the distributive share of each must be entered as partnership income in Part III of Schedule B for income tax

purposes, and on page 1, line 1(b), of separate Schedule F-1 for self-employment tax purposes. (Use separate Schedule C-3, to report nonfarm income for social security purposes.)

19. The petitioner's wife did not file a self-employment social security form for any of the years hereunder review and did not pay self-employment social security taxes.

20. The petitioner testified that his reason for filing an individual self-employment social security tax return, reporting all of the net farm business income as his income, was so that he would receive the maximum benefit under the social security plan; and that he and his wife did not split the farm business income because he wanted to keep his income high rather than having two mediocre incomes for social security tax purposes.

21. Neither the petitioner nor his wife filed Federal or Wisconsin informational partnership returns for any of the years hereunder review.

22. The petitioner registered the farm trucks and automobiles in his own name, rather than in the joint names of himself and his wife, to avoid inusrance and accident liability problems.

23. For each of the years hereunder review, the petitioner and his wife filed Wisconsin combined income tax returns in which they equally split the net farm business income, each reporting half of such net farm business income in his portion of said return. The petitioner and his wife also equally split the net rental income from the

jointly owned rental properties (the equal splitting of such net rental income is not here in dispute).

24. The respondent disallowed the splitting of the net farm business income between the petitioner and his wife for each of the years hereunder review and allowed the splitting of the net rental income from jointly owned rental properties during the years hereunder review.

25. The petitioner contends that the farm business in question was conducted by the petitioner and his wife as a partnership. The petitioner further contends that there is no difference between the splitting of the farm business income and the splitting of the rental income from jointly owned property.

26. The farm business books and records were not kept in a manner which would reflect the existence of a farm business partnership between the petitioner and his wife. There was no division of the farm business profits at any time during the year or at year end between the petitioner and his wife.

27. The petitioner and his wife did not hold themselves out to the public as being engaged in the farm business as a partnership.

28. The farm business in question was not conducted by the petitioner and his wife as a farm business partnership or a farm business joint venture; said business was conducted by the petitioner as a sole proprietorship with the loyal assistance and cooperation of his wife.

WISCONSIN STATUTES INVOLVED

(1965 - 1967)

Section 71.02 Definitions.

"(2) DEFINITIONS APPLICABLE TO NATURAL PERSONS AND FIDUCIARIES. As used in this chapter:

"(a) 'Federal taxable income' and 'federal adjusted gross income' of natural persons and fiduciaries, mean the taxable income or adjusted gross income of the taxpayer as determined by the taxpayer for the taxable year under the internal revenue code, or, if redetermined by the department, as determined by the department under the internal revenue code or as may be determined on final appeal therefrom.

"(e) 'Wisconsin adjusted gross income means federal adjusted gross income, with the modifications prescribed in s. 71.05 (1) and (4).'"

CONCLUSIONS OF LAW

1. The farm business in question was not conducted by the petitioner and his wife either in law or in fact as a farm business partnership or a farm business joint venture.

2. There is no provision made in Chapter 71 for the method of splitting the net farm business income used by the petitioner and his wife in their 1966 through 1968 combined Wisconsin income tax returns.

3. The net farm business income in question was assessable and taxable solely to the petitioner.

4. The respondent's action was proper in including in the petitioner's Wisconsin total income for each of the years hereunder review the half of the net farm business income reported by his wife in her portion of the combined Wisconsin income tax returns.

See attached list of cases.

Therefore,

IT IS ORDERED

That the respondent's denial of the petitioner's application for abatement in the above-entitled matter be and the same is herby affirmed.

Dated at Madison, Wisconsin, this 30th day of March, 1972.

WISCONSIN TAX APPEALS COMMISSION

C. L. Finch, Chairman

Thomas R. Timken, Commissioner

John P. Morris, Commissioner

FILED
MAR 13
MICHAEL RODAK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1268

EUGENE H. SKAAR and
ELLEN SKAAR, his wife,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF RESPONDENT IN OPPOSITION

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March 12, 1974

INDEX AND SYNOPSIS OF ARGUMENT

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2-5

ARGUMENT 6-11

This Court Has No Jurisdiction To Review The Judgment Of The Wisconsin Supreme Court Herein Because It Decided No Federal Question 6-11

A. No federal question was properly presented to or decided by the Wisconsin Supreme Court 6-8

B. This Court, therefore, lacks jurisdiction to review the judgment of the Wisconsin Supreme Court 8-11

CONCLUSION 11

CASES CITED

Bloeth v. New York (1962),
82 S.Ct. 661, 7 L.Ed. 2d 780 8

Bowe v. Scott (1914),
233 U.S. 658, 34 S.Ct. 769, 58 L.Ed. 1141 7

Brinkerhoff-Faris Trust & Sav. Co. v. Hill (1930),
281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 10

Capital City Dairy Co. v. Ohio (1902),
183 U.S. 238, 22 S.Ct. 120, 46 L.Ed. 171 7

Page

Cardinale v. Louisiana (1969),
394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398 9

DeBacker v. Brainard (1969),
396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148 10

Durley v. Mayo (1956),
351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178 8

Hanson v. Denckla (1958),
357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 8

Henry v. Mississippi (1965),
379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408 11

Herb v. Pitcairn (1945),
324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 11

Herndon v. Georgia (1935),
295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 7

Hill v. California (1971),
401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed. 2d 484 10

Hope Acres, Inc. v. Harris (1965),
27 Wis. 2d 285, 134 N.W. 2d 462, 135 N.W. 2d 775 8

Lawn v. United States (1958),
355 U.S. 339, 78 S.Ct. 311, 2 L.Ed. 2d 321 8

Martinson v. Brooks Equipment Leasing, Inc. (1967),
36 Wis. 2d 209, 152 N.W. 2d 849, 154 N.W. 2d 353 8

Monks v. New Jersey (1970),
398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed. 2d 54 10

Neely v. Eby Construction Co. (1967),
386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed. 2d 75 8

Page

Oxley Stave Company v. Butler County (1897),
166 U.S. 648, 17 S.Ct. 709, 41 L.Ed. 1149 7

Radio Station WOW, Inc. v. Johnson (1944),
326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 8

United Gas Public Service Co. v. Texas (1938),
303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702 11

Uren v. Purity Dairy Co. (1948),
252 Wis. 446, 32 N.W. 2d 615, 33 N.W. 2d 213 8

UNITED STATES STATUTE

28 U.S.C. §1257 (3) 2,8

WISCONSIN STATUTE

Section 71.10 (3) (a) 4

OTHER AUTHORITY

5 C.J.S., Appeal and Error, §1421a 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1268

EUGENE H. SKAAR and
ELLEN SKAAR, his wife,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported in 61 Wis. 2d 93, 211 N.W. 2d 642, and is reproduced in the petitioners' appendix, pages 1 through 13. A motion for rehearing was denied by the Wisconsin Supreme Court on December 21, 1973, without opinion. The unreported decisions of the Dane County Circuit Court and the Wisconsin Tax Appeals Commission are found, respectively, in petitioners' appendix, pages 14 through 25 and 28 through 36.

JURISDICTION

The jurisdiction of this Court is sought to be invoked under the provisions of 28 U.S.C. §1257 (3). This Court, however, lacks jurisdiction to review the judgment of the Wisconsin Supreme Court since that court decided no federal question.

QUESTIONS PRESENTED

No federal question is properly presented herein. The "Questions Involved" as set forth in the petition were neither properly presented to nor decided by the Wisconsin Supreme Court.

STATEMENT OF THE CASE

The petitioners were married in 1942 and have three children who were 21, 18, and 16 in 1966. Mr. Skaar returned from military service about the end of 1945 and started farming. Neither he nor his wife then had any wealth, except his mustering-out pay, and neither has since inherited money or other property. Until the death of his father in 1957, Mr. Skaar and his brother rented on shares two farms from their father. In 1958 the brothers continued operating as a partnership and sharing with their father's estate. Thereafter each began renting on his own. The father's will provided that each son could purchase certain farm property. Mr. Skaar operated the farm which he could buy from his father's estate and another farm which he rented from his mother.

On August 30, 1966, Mr. Skaar as vendee executed a land contract, naming him and his wife as vendees, for the purchase of the farm held by his father's trustee. In 1971 he discovered that his wife had not signed the contract, and they then both signed it. On March 1, 1967, the petitioners as vendees executed a land contract for the purchase of the farm previously rented from his mother.

The petitioners had only one bank account, a joint checking account in which they deposited all receipts, including Mr. Skaar's income from his positions as town chairman and drainage district commissioner, and from which they paid all business and personal expenses. In addition to the farm income and Mr. Skaar's separate income from his public offices, they had rental income.

Milk checks were payable to either of the petitioners but most bills came in his name only. The registered cattle on the farm were registered in the name of Mr. Skaar only, and he testified that this was done for convenience. During the years involved, 1966-68, automobiles and trucks were registered in Mr. Skaar's name only. He testified that this was done so that his insurance (and not just medical payment insurance) would cover his wife, were she injured while he was driving.

The oldest child, Vicky, left home in 1963 to enter nurses' training and did not return. The middle child, Larry, was graduated from high school in 1966 and went on to college. The younger son, John, reached age 16 on June 1, 1966. During the years involved, Mrs. Skaar maintained the home for herself, her husband, and Larry and John when they were home. Mrs. Skaar worked in the field, drove any of their eight tractors, milked and fed cows, and worked about the same amount of time in running the farm as did her husband.

For the years involved, social security self-employment taxes were paid for Mr. Skaar but not for his wife. He testified that the reason for this was to keep his income high so as to get better social security benefits than with two mediocre incomes. The total Wisconsin taxable income reported by the petitioners for the years involved was:

1966	$14,647.41
1967	10,596.70
1968	17,982.01

The petitioners did not file partnership income tax returns which, contrary to statements in the Petition, were required by Wisconsin law, sec. 71.10 (3) (a), Wis. Stats.

They each testified before the Wisconsin Tax Appeals Commission that there was an oral agreement between them as to the farming enterprise. He testified that the agreement was to put all income into a joint account and to pay expenses thereform. When asked for the terms of the agreement, he answered that he and his wife had done jointly so many things that their "oral agreements have just come by themselves." She testified that the agreement as to division of the work was that she knew she could help him with certain things when she had time, and that she had more time as the children grew up. Mr. Skaar testified that there was no agreement for dividing between them the profits of the farming enterprise. He also testified that there was no change in the agreement between himself and his wife, as to management of the farm and ownership of the property and profits, when the rental arrangement terminated and the land contracts were executed.

On their combined Wisconsin income tax returns for 1966-1968, the petitioners divided the farm income equally between them. The respondent made an assessment of additional tax against Mr. Skaar, based upon a nonrecognition of the alleged partnership. The assessment against Mr. Skaar was in the amount of $1,910.09, and it necessitated a refund in the amount of $1,002.15 to Mrs. Skaar, making the net additional assessment $907.94. The respondent denied an application for abatement, and Mr. Skaar petitioned the Commission for review.

The Commission found that the farm business records were not kept in a manner reflecting the alleged partnership, that there was no division of farm profits between the petitioners, that they did not hold themselves out to the public as being engaged in a business partnership, that they did not

file partnership income tax returns, that Mrs. Skaar did not pay self-employment social security taxes, that the farm business was not conducted by them as a partnership or joint venture, and that the farm business was conducted by Mr. Skaar as a sole proprietor. The Commission also found that the petitioners had an oral understanding that they would work together, own everything together, manage the farm together, and that if one of them died, the other would have everything, to the exclusion of their children. The Commission concluded that the farm income was taxable solely to Mr. Skaar and affirmed the denial of the application for abatement.

The lower court on review concluded that the Commission's finding of fact that the farm was not conducted by the petitioners as a partnership or joint venture was a conclusion of law, rather than a finding of fact, and also concluded that the Commission erred as a matter of law in concluding that the petitioners did not conduct their farming operations as a partnership or joint venture.

The Wisconsin Supreme Court reversed the judgment of the lower court. It, with two justices dissenting, found that under Wisconsin law the petitioners had failed to establish that they had, in fact, formed a bona fide partnership for Wisconsin income tax purposes during the tax years 1966 through 1968 and that the Wisconsin Tax Appeals Commission had properly so concluded.

ARGUMENT

This Court Has No Jurisdiction To Review The Judgment Of The Wisconsin Supreme Court Herein Because It Decided No Federal Question.

A. No federal question was properly presented to or decided by the Wisconsin Supreme Court.

The respondent herein was the appellant in the Wisconsin Supreme Court. The issue raised by it was solely an issue of state law. As described by the Wisconsin Supreme Court in its decision:

> "The sole issue is whether the Wisconsin Tax Appeals Commission erred in affirming the Department of Revenue's denial of the taxpayer's application for abatement of the additional [Wisconsin] income tax assessment by concluding that, as a matter of law, no bona fide [Wisconsin] partnership existed." (App. to Petition, p. 4.)

The petitioners did not cross appeal nor did they otherwise present to the Wisconsin Supreme Court the questions raised by them in their petition to this Court. Included in the "Issues Involved" section of the petitioners' state court respondents' brief, in which a number of issues were listed, was the word "unconstitutional," but no reference was made in that section to the United States Constitution or any specific provision thereof. Use of the word "unconstitutional" or some similar ambiguous word or phrase is completely insufficient

to raise a federal question in a state court and to preserve that question for review by this Court.[1]

The Wisconsin Supreme Court reversed the judgment of the lower court because it determined that the Wisconsin Tax Appeals Commission had properly affirmed the decision of the present respondent under Wisconsin law and for Wisconsin income tax purposes since:

> "* * * on the facts of this case the taxpayers have failed to establish that they have in fact formed a bona fide partnership." (App. to Petition, p. 10.)[2]

The Wisconsin Supreme Court, therefore, determined only a question of state law and the federal questions which the petitioners now attempt to raise in this Court were neither properly raised in nor decided by the Wisconsin Supreme Court.

The petitioners did subsequently make a motion for rehearing to the Wisconsin Supreme Court and they did then attempt to raise some federal constitutional issues. The rule in Wisconsin, and elsewhere, however, is that the supreme court will not consider questions raised for the

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[1] See, *Oxley Stave Company v. Butler County* (1897), 166 U.S. 648, 655, 17 S.Ct. 709, 41 L.Ed. 1149; *Capital City Dairy Co. v. Ohio* (1902), 183 U.S. 238, 248, 22 S.Ct. 120, 46 L.Ed. 171; *Bowe v. Scott* (1914), 233 U.S. 658, 664, 665, 34 S.Ct. 769, 58 L.Ed. 1141; and *Herndon v. Georgia* (1935), 295 U.S. 441, 442, 443, 55 S.Ct. 794, 79 L.Ed. 1530.

[2] The Wisconsin Supreme Court made mention of the "multiple issues" in the present petitioners' respondents' brief, but held that "an answer was not required so as to decide the controlling question involved." (App. to Petition, p. 9.)

first time on a motion for rehearing.[3] It, therefore, denied the motion for rehearing without opinion.

This Court, in the absence of some extraordinary circumstances, will not review questions which were not properly raised below.[4] A question is not properly raised below when, as here, it was first raised on a motion for rehearing which the state court denied without opinion.[5]

B. This Court, therefore, lacks jurisdiction to review the judgment of the Wisconsin Supreme Court.

The jurisdiction of this Court to review on certiorari the final judgments or decrees of state courts is set forth in 28 U.S.C. §1257 (3). Such jurisdiction exists *only* when a federal question has been properly presented to and decided by the highest court of the state and its decision of the federal question was necessary in its determination of the cause. In *Durley v. Mayo* (1956), 351 U.S. 277, 281, 76 S.Ct. 806, 100 L.Ed. 1178, 1183, this Court wrote:

Martinson v. Brooks Equipment Leasing, Inc. (1967), 36 Wis. 2d 209, 224b, 152 N.W. 2d 849, 154 N.W. 2d 353; *Hope Acres, Inc. v. Harris* (1965), 27 Wis. 2d 285, 300a, 134 N.W. 2d 462, 135 N.W. 2d 775; and *Uren v. Purity Dairy Co.* (1948), 252 Wis. 446, 459a, 459b, 32 N.W. 2d 615, 33 N.W. 2d 213. Generally see, 5 C.J.S., *Appeal and Error*, §1421a, p. 547.

[4] *Lawn v. United States* (1958), 355 U.S. 339, 362, n. 16, 78 S.Ct. 311, 2 L.Ed. 2d 321, and *Neely v. Eby Construction Co.* (1967), 386 U.S. 317, 330, 87 S.Ct. 1072, 18 L.Ed. 2d 75.

[5] *Hanson v. Denckla* (1958), 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283; *Radio Station WOW, Inc. v. Johnson* (1944), 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092; *Bloeth v. New York* (1962), 82 S.Ct. 661, 7 L.Ed. 2d 780.

" 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v Hanan, 300 US 14, 18; Lynch v. New York, 293 US 52. * * *' "

A more recent case in which a writ of certiorari was dismissed for want of jurisdiction because of a failure to raise the federal question in the highest state court is *Cardinale v. Louisiana* (1969), 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398. This Court, in dismissing the writ, wrote (394 U.S. 437, 438):

"Although certiorari was granted to consider this question [admissibility of a confession], the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat 85, vested this Court with *no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.'* 10 Pet 368, 391, 9 L Ed 458, 467. *The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion.* Miller v Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819),

and since, e.g. Safeway Stores, Inc. v Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v. Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875)." (Emphasis added.)

See also the still more recent cases of *Hill v. California* (1971), 401 U.S. 797, 805, 806, 91 S.Ct. 1106, 28 L.Ed. 2d 484, 490, 491; *Monks v. New Jersey* (1970), 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed. 2d 54; and *DeBacker v. Brainard* (1969), 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148.

As revealed by the opinion of the Wisconsin Supreme Court herein, none of the questions presented by this Petition were properly raised in or decided by the Wisconsin Supreme Court.

The sole question presented to the Wisconsin Supreme Court and decided by it was a question of state law. Questions of state law are not reviewable by this Court on a petition for certiorari to review a judgment of the highest court of a state. This fact was pointed out by Justice Brandeis in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill* (1930), 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107, wherein he wrote:

"It is true that *the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state*; that *this court's power to review decisions of state courts is limited to their decisions on*

federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court." (Emphasis added.)

See also *Henry v. Mississippi* (1965), 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408; *Herb v. Pitcairn* (1945), 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789; *United Gas Public Service Co. v. Texas* (1938), 303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702, and many others.

CONCLUSION

For the above reason this Court has no jurisdiction to review the judgment of the Wisconsin Supreme Court herein and the petition for certiorari should be denied.

Respectfully submitted,

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In The

SUPREME COURT of the UNITED STATES

October Term, 1973

No. 73-1268

EUGENE H. SKAAR and
ELLEN SKAAR, is wife,

Petitioners,

v.

WISCONSIN DEPARTMENT OF
REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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INDEX AND SYNOPSIS OF ARGUMENT

PAGE

REPLY ISSUES INVOLVED 2

STATEMENT OF FACTS 3-5

ARGUMENT 6-12

A. *Federal Constitutional Questions Were Properly Presented To The Court Below* 6-12

B. *This Court Has Jurisdiction To Review The Judgment Of The Wisconsin Supreme Court Herein Because It Decided The Federal Questions By Refusing To Allude To Those Properly Presented* 10

CONCLUSION 12

CASES CITED

Cardinale v. Louisiana (1969), 394 U. S. 437, 89 S. Ct. 1162, 22 L. Ed. 2d 398 ..... 11, 12

Hoeper v. Tax Commissioner (1931), 248 U. S. 206, 52 S. Ct. 120 ..... 3, 6, 8, 9, 10, 11

Otte v. Commissioner, T. C. Memo 1972-76, March 28, 1972 5

WISCONSIN STATUTES

PAGE

Section 71.10 (3) (a) 3

227.20 (1) 5

246.01 ..... 6, 9

246.03 ..... 6, 9

246.15 ..... 6, 9

700.17 (2) 9

TEXTS CITED

48 Am. Jur. 2d (Labor and Labor Relations), sec. 2 4

48 Am. Jur. (Appeal and Error), Chapter 988, page 414 7

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The purpose of this reply is to refute the arguments of the respondent in its brief in opposition to the petition for a writ of certiorari to the Supreme Court of Wisconsin.

REPLY ISSUES INVOLVED

1. Was a federal question properly presented to the Wisconsin Supreme Court? We submit that it was.

2. Does this Court have jurisdiction to review the judgment of the Wisconsin Supreme Court? We submit that it does.

References to "App. ....." are to the separate Appendix to petitioner's petition.

References to "WBr. ....." are to petitioners brief and appendix as respondents in the Wisconsin Supreme Court.

References to "WRBr. ....." are to petitioner's brief on motion for rehearing in the Wisconsin Supreme Court.

STATEMENT OF FACTS

The respondent states at page 4 of its brief, that,

> "The petitioners did not file partnership Income Tax Returns which, contrary to statements in the petition, were required by Wisconsin law, sec. 71.10 (3) (a), Wis. Stats."

The Wisconsin Supreme Court determined that petitioners were not a partnership under Wisconsin law, therefore, they could not be required to file partnership income tax returns required by the above mentioned Wisconsin law. That is a part of the federal constitutional question now before this Court on the basis that other husband and wife taxpayers are not required to file partnership income tax returns in order to report their separate income, which should be extended to the petitioners under the Wisconsin Women's Equal Rights Act and the decision of this Court in *Hoeper v. Tax Commission*, 248 U. S. 206, 52 Sup. Ct. 120 (1931).

The statement of the respondent that the petitioners did not properly present to the Wisconsin Supreme Court the constitutional questions raised by them in their petition to this Court, is not supported by the record in the Wisconsin Supreme Court. The petitioners in this Court were the respondents in the Court below. In their first brief to the Court below, constitutional references and arguments in support thereof appear as follows:

In the Index at page v, reference is made to "CONSTITUTIONAL AMENDMENTS INVOLVED, Federal Constitution, Fourteenth Amendment."

Also, excerpts of the brief are as follows:

In 48 Am. Jur. 2d, (Labor and Labor Relations) at sec. 2, is stated:

"The right to labor and to its protection from unlawful interference is a Constitutional as well as a common law right. Every man has a right to the fruits of his own industry. *Labor is deemed to be property,* especially within the meaning of the Constitutional guarantees. Thus the right to acquire property includes the right to acquire property by labor. The right to earn wages is just as much property and within the meaning of the due process clause of the Fourteenth Amendment to the Federal Constitution." (Emphasis ours) (W Br. 31, 32)

"To deny the wife the right to claim one-half of the farm income is a direct violation of the Fourteenth Amendment of the Federal Constitution; the First Amendment of the Wisconsin Constitution; the spirit of Wisconsin Fair Employment Practice Act, (sec. 111.31 (1) and the proposed Women's Rights Amendment to the Federal Constitution." (W Br. 32) . . .

"Income tax, inheritance tax and federal estate taxes are dependent upon each other and must be considered together in determining ownership and contribution of money or monies worth. The Commission denied to the taxpayers the right to split their income for tax purposes. This was prejudicial to the husband by increasing his tax, and prejudicial to the wife by denying her the right to claim half of the property that she earned as exempt from federal tax and state inheritance tax in the event of the death of her husband." (W Br. 30) . . .

"This imposition of additional federal estate tax by the department (by interpretation) upon the taxpay-

ers of Wisconsin must be clarified by the Court in the absence of legislation. Lawyers and tax planners should be provided with clear rules regarding ownership and taxation of property in order that they can advise their clients with any degree of certainty and reliability." (W Br. 31) . . .

"The inequity of Wisconsin denying the wife the right to claim one-half of their property as exempted from federal estate tax under the rule of *Otte* is discussed at part XI above." (W Br. 36) . . .

"The decision of the Commission denied the wife a substantial property right by not allowing her to claim for tax purposes the one-half of the farm income in accordance with the agreement with her husband and to which she contributed as much work, property, energy and management as her husband." (W Br. 39) . . .

"The decision of the Commission should be reversed for having prejudiced substantial rights of the taxpayers as a result of its findings, inferences and conclusions being contrary to their constitutional rights and unsupported by substantial evidence in view of the entire record as submitted, in accordance with the provisions of Section 227.20 (1), Wis. Stats." (W Br. 40)

ARGUMENT

The issues raised in this case are not solely the issues of state law. The same United States Constitutional issues exist in this case as existed in *Hoeper v. Tax Commission*, supra, whereby this Court reversed 202 Wis. 493, 233 N. W. 100 (1930) and held that the statute combining separate earnings of the wife with that of the husband for tax purposes, violated the Due Process Clauses of the Fourteenth Amendment, United States Constitution. This Court based that decision on the Wisconsin Women's Equal Rights Act,[1] which designates a married woman's earnings, even though from a joint enterprise with her husband, as her separate and distinct property and earnings. This federal constitutional argument was presented to the Court on motion for rehearing and petitioners oral argument included the argument relative to the Wisconsin Women's Equal Rights Act. The oral argument did not specifically refer to *Hoeper*, but *Hoeper* was briefed and argued on motion for rehearing.

At the bottom of page 8 and top of page 9 of Respondent's Brief in Opposition to Petition, is stated:

> "The petitioners did subsequently make a motion for rehearing to the Wisconsin Supreme Court and they did then attempt to raise some federal constitutional issues. The rule in Wisconsin, and elsewhere, however, is that the supreme court will not consider questions raised for the first time on a motion for rehearing. *It, therefore, denied the motion for rehearing without opinion.*" (Emphasis ours)

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[1]Sections 246.01, 246.03 and 246.15, Wis. Stats.

Nothing in the record nor the files of the Clerk of the Wisconsin Supreme Court indicate that that was the reason it denied the motion for rehearing, which they did deny, without costs. This is an unsupported assumption on the part of the respondent.

The Wisconsin Supreme Court usually renders an opinion in denying a motion for rehearing when the brief in support of same brings up entirely new facts, new subject matter or new argument that was not presented to the Court by brief or oral argument in any manner, as they did in *Martinson, Lawn* and *Hanson,* cited at page 8 of Respondent's Brief. In our case, the Court realized that some federal constitutional issues were presented to it by brief and oral argument and therefore, denied the motion without opinion on the merits of the argument. In *Martinson, Lawn* and *Hanson,* the fact, subject matter or argument presented to the Court on motion for rehearing was not mentioned or presented to the Court in any manner prior thereto, which is not this case. The constitutional issues were not discussed by petitioners as thoroughly by brief and oral argument as they were in the brief on motion for rehearing. A better statement of the law applicable here, is found in *Am. Jur.* 2d (Appeal and Error), Ch. 988, page 414, which states:

> "Rehearings are not granted as a matter of right,[10] and are not allowed merely for the purpose of reargument,[11] unless there is a reasonable probability that the court may have arrived at an erroneous conclusion[12] or overlooked some important question or matter necessary to a correct decision.[13] *The rehearing may be granted if the decision was based on a wrong principle of law*[14] *as where the decision is in conflict with*

an express statute,[15] *or with a controlling decision to which the court's attention was not called."*[16] (Emphasis ours)

The Wisconsin Supreme Court was aware of petitioner's oral argument in support of federal constitutional issues presented and those presented it by brief prior to the motion for rehearing. In the oral argument specific mention was made to the Wisconsin Married Women's Equal Rights Act and the unequal protection of the law which made a Wisconsin widow pay $9,350.00 Federal Estate Tax while the same woman with the same estate and under the same circumstances in Indiana would pay no tax. The brief on motion for rehearing expanded the oral argument of the petitioners before the Court relative to the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, U. S. Constitiution. It further argued that the Court in its decision had arrived at an erroneous conclusion, overlooked an important question, and that the decision was in conflict with an express Wisconsin statute. It also overlooked the controlling decision of *Hoeper*, supra, to which its attention was not previously called. The motion for rehearing also, asked the Court to make a decision upon the federal constitutional questions that were presented to it by brief and oral argument.

Wisconsin law allows husbands and wives to split their joint income from rents, interest, dividends and capital gains on the Wisconsin Combined Income Tax Returns without filing a partnership return, because it was forced to recognize that one-half thereof is the separate earnings of each spouse in accordance with the Joint Tenancy Laws

of Wisconsin,[2] the Women's Equal Rights Act of Wisconsin, supra, and the decision of this Court in *Hoeper,* supra. What the Wisconsin Department of Revenue refused to accept as law was the fact that the right to split their separate income, without filing a partnership tax return, applied also to business income from joint property that was contributed to substantially by capital investment with the remainder of the contribution being the equal management and labor of the husband and wife. If the Wisconsin Supreme Court allows the ownership of capital the right to split income therefrom, the Fourteenth Amendment, United States Constitution, guarantees the separate property right of both the husband and the wife in their labors. This Constitution question was presented to the Court below for its consideration in petitioners very first brief to the Court.

The present petitioners also presented the basis of the federal Constitutional argument to the Court below in their oral argument before the Court. This argument was orally made to the Court in the context of the application of the Wisconsin Women's Equal Rights Act, which are Sections 246.01, 246.03 and 246.15, Wis. Stats., and were referred to the Court on the same basis that this Court ruled in *Hoeper,* supra. As a follow-up to the petitioner's oral argument before the Court below, they presented same in writing in their brief on motion for rehearing at WR Br. 9-11, under the heading of *"Decision Unconstitutional Under Fourteenth Amendment."* Reference was made therein to the Due Process and Equal Protection clauses of the federal Constitution, and was an expansion

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[2]Section 700.17 (2), Wis. Stats.

of the oral argument previously had before the Court below. Motions for rehearing are authorized by Section 257.65, Wis. Stats. The statutes do not prevent the expansion of a part of the oral argument previously presented to the Court. I know of no Wisconsin case or statute that prevents the presentation of Constitutional issues to the Court on motion for rehearing, that were presented to the Court below in either the brief filed with the Court or the oral argument before the Court. The Wisconsin Supreme Court frowns upon any oral argument that is a repetition of the argument in the briefs previously filed with the Court. The respondents are of the opinion that the federal Constitutional issues were properly presented to the Court below and they were not presented for the first time in the motion for rehearing.

Respondents also contend on page 7 of its response, that the federal questions were not decided by the Wisconsin Supreme Court. We contend that the Court admitted the proper presentation of the federal Constitutional issues to it and decided upon them when it made mention of the "multiple issues" presented to it by the present petitioners at App. 9. Why the Court below did not formally allude to the federal Constitutional questions presented it in its opinion, is unknown to us. It must be admitted that it read them in the brief and heard them in the oral argument and that it read the brief on motion for rehearing. The fact is that the Court below still (Despite *Hoeper* and the above statutes) clings to the old archaic common law rule that, "When man and woman get married, they become one, and the husband is that 'one", and that no matter how much work and management a wife contributes to a joint business with her hus-

band, she is "only assisting him" and all the joint property and earnings therefrom "are his property for all tax purposes".

We submit that the decision of this Court in *Hoeper*, supra, has included the petitioners property rights under the Due Process and Equal Protection clauses of the United States Constitution and that the question was properly submitted to and decided by the Court below. A federal question has been presented to this Court by the petitioners.

A review of all the federal cases cited by respondent in its brief in support of its legal contention that the federal question was raised for the first time are cases in which any mention of federal constitutional questions, or the subject matter in support thereof, was admittedly not presented *in any way* to the Court below. (Emphasis ours) In *Cardinale v. Louisiana* (1969), 394 U. S. 437, 89 S. Ct. 1162, 22 L. Ed. 2d 398, the Court said in this regard:

> "In view of the petitioner's admitted failure to raise the issue he presents here *in any way below*, the failure of the state court to pass on this issue, the desirability of giving the State the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to petitioners, the writ is dismissed for want of jurisdiction." (Emphasis ours)

The law is clear that any argument, fact or legal discussion is proper to be presented to the Court for the first time in oral argument before that Court. This principle

of legal procedure is confirmed in *Cardinale* where it wrote (394 U. S. 437, 438):

> "Although certiorari was granted to consider this question (admissibility of a confession), *the fact emerged in oral argument that the sole federal question argued here had never been raised,* preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." (Emphasis ours)

CONCLUSION

It is not only the petitioners, but thousands of other husbands and wives in Wisconsin, that are asking this Court, as our Court of last resort, under exceptional circumstances necessitated by justice and equity, to issue a Writ of Certiorari to the Supreme Court of Wisconsin, or remand same back to the Court below with the directive to reconsider the federal Constitutional questions presented it and make a written decision thereon.

Respectfully submitted,

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